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No. 07-1096

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STROMAN REALTY, INC., PETITIONER

v.

DEAN MARTINEZ, Secretary of the Illinois Department of Financial and Professional Regulation, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The doctrine of *Younger* abstention has not been consistently applied by the circuit courts of appeals with some circuits discounting the federal interest and focusing instead upon the state interest in determining whether abstention is required. This failure to conduct a reasoned threshold analysis will result in abstention becoming the rule, rather than the exception, in cases involving administrative proceedings. Further, there is considerable disagreement among the circuits as to how to synthesize the principles of res judicata and collateral estoppel with *Younger* abstention in a case involving administrative proceedings; specifically, whether a party is obligated to pursue state court review of an administrative action to avoid res judicata or collateral estoppel on the legal issues that could have been addressed by a reviewing court but not the underlying administrative forum.

The questions presented for review are as follows:

1. Whether abstention in favor of a state administrative proceeding is required in cases involving important federal interests such as the commerce clause, where the underlying principle of comity is necessarily diminished thereby justifying "a narrower view of state interests in the abstention context". *Harper v. Pub. Serv. Comm'n of West Virginia*, 396 F.3d 348, 357 (4th Cir. 2005).

2. Whether *Younger* abstention should be expanded to require a federal court to abstain where an administrative proceeding is filed after institution of the federal case and the federal plaintiff cannot obtain review of the constitutional issues until subsequent court review which is restricted to the limited record before the agency.

3. Whether *Younger* abstention requires a party to pursue a state court appeal of an administrative agency decision to avoid the application of res judicata on legal issues when the agency cannot consider the constitutional question presented by that party.

RULE 29.6 STATEMENT

Stroman Realty, Inc. is held by Stroman Interests, Ltd. No publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Stroman Realty, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 505 F.3d 658. App. 1a-11a. The order denying the petition for rehearing and rehearing en banc is unreported. App. 27a. The opinion of the United States District Court for the Northern District of Illinois is reported at 438 F. Supp. 2d 929. App. 12a-26a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on October 10, 2007. It denied petitioner's petition for rehearing on November 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article I, § 8, cl. 3 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . .

STATEMENT OF THE CASE

This case presents the Court the opportunity to resolve a conflict among the circuit courts of appeals and to provide necessary guidance in the application of the *Younger* abstention doctrine to claims brought in federal court.[1] The Fourth Circuit has refused to apply

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

Younger abstention where the federal claim was pursuant to the commerce clause and therefore did not implicate questions of comity and federalism, the underpinning of *Younger*. In contrast, the Seventh Circuit rejected that analysis and found *Younger* abstention appropriate based upon a purported state interest in regulating real estate professionals. This case also provides this Court the opportunity to answer the question as to whether *Younger* abstention should be applied where the state official files administrative proceedings against the federal plaintiff only after the federal court litigation has commenced thereby depriving the federal plaintiff of a federal forum to address his constitutional claims pursuant to 42 U.S.C. § 1983. Further, this Court should address whether *Younger* applies to federal cases seeking to enjoin future administrative enforcement actions and to what extent federal court plaintiffs must participate in a state's administrative and judicial review process before bringing such claims in federal court.

1. The Timeshare Industry.

The concept of purchasing time intervals for the use of vacation resort facilities was introduced in the 1960's. App. 30a. Although these intervals can be "traded" for use of other intervals in different geographic locations through an exchange network, timeshares are typically treated by the states as real property interests subject to the states' real estate laws in the advertising, sale and brokerage of these interests. *See* App. 43a-55a.

The timeshare industry has grown to be a multi-billion dollar industry. App. 31a. In 2002, timeshare developers alone sold approximately $5.5 billion in

timeshare intervals in the United States, comprising nearly 60% of timeshare sales worldwide. *Id.* These initial sales cost millions of dollars to market and the advertising efforts are nationwide. App. 35a. Of the initial prices of vacation timeshares, anywhere from 30% to 65% of the price of a new sale is for the cost of marketing, promotion and advertising by the resort owner. *Id.*

Many timeshare owners need or want to sell their intervals; as a result, a secondary market in timeshare sales ("resales") has developed. App. 33a. Because of the specialized nature of the timeshare resale market and the almost prohibitive cost of marketing a timeshare on a small scale, however, most traditional real estate salespersons are not equipped to handle this secondary market, nor are they interested in doing so. App. 34a-35a.

As with initial sales, potential purchasers in the resale market for vacation timeshares are located throughout the country and the world. App. 33a. The sellers, however, are also dispersed throughout the country. App. 36a. To market these intervals effectively for resale, a nationwide marketing program is necessary to reach these dispersed buyers and sellers. App. 35a. Timeshare resale brokers have filled this niche and can fund nationwide advertising campaigns by pooling advertising fees collected from individual owners wishing to resell their timeshare intervals. Stroman was one of the first and largest resale brokers. Nationally, consumer resales totaled approximately $390 million in 2002. App. 31a-32a.

2. Stroman's Lawsuit.

Stroman has conducted its timeshare brokerage business in the interstate resale market for over 25 years. App. 36a. All of Stroman's operations are conducted in Texas. App. 39a, 41a-42a. Stroman spends millions of dollars each year on its advertising and promotional efforts and has an active internet site that promotes its services worldwide and advertises timeshares throughout the United States. App. 37a-38a. Stroman advertises every day in national, international, regional and local media with a circulation ranging from 15 to 24.5 million readers. App. 37a. Stroman's internet web site identifies resorts and the types of intervals for sale at each resort, including the attributes of the intervals. App. 38a. A computer user is free to browse the site for various timeshares to determine if there is an interval he wishes to purchase. *Id.* A potential purchaser can make an offer over the internet or call one of Stroman's Texas-licensed real estate agents. *Id.*

Daily, Stroman agents speak to approximately 1,000 different people who reside in numerous states and outside the United States. App. 35a-36a, 41a. A caller may inquire about different timeshares available in several different states during the same call. App. 41a. For example, a New York resident may inquire about an Illinois based timeshare owned by a Colorado resident and also a California based timeshare owned by an Illinois resident during the same phone call. *Id.*

Each of Stroman's sales associates is a licensed real estate salesperson or broker in the State of Texas and a member in good standing of the National Association of

REALTORS.® App. 39a. As such, they are bound by the statutes and regulations of the State of Texas and the Code of Ethics and Standards of Practice of the National Association of REALTORS.® *Id.* Both the laws of the State of Texas and the Code of Ethics and Standards require honesty by a real estate agent and prohibit false or misleading representations. *Id.*

On May 10, 2005, the Illinois Department of Financial and Professional Regulation, Division of Banks and Real Estate ("DFPR"), sent Stroman a cease and desist notice which asserted violations of Illinois real estate licensing laws based on Stroman's advertising timeshare resales and its alleged brokerage services in Illinois. App. 3a. DFPR claimed that Stroman and its salespeople had to obtain Illinois real estate broker's and salesperson's licenses and comply with all Illinois' laws and regulations for Stroman to conduct any activities that involve any Illinois based timeshare interests, any timeshare interests that are headquartered in Illinois, or any Illinois residents, regardless of the location of the timeshare interests. *Id.*

Stroman filed suit in federal court seeking injunctive relief against DFPR pursuant to 42 U.S.C. § 1983 for violation of the dormant commerce clause, U.S. Const. art. I, § 8, cl. 3. App. 28a-60a. Stroman complained that DFPR unconstitutionally projected Illinois law into Texas and that Illinois' laws discriminated against interstate commerce both in effect and under the *Pike* balancing test.[2] App. 56a-58a.

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[2] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In its federal suit, Stroman specifically alleged that, by its actions and based on its real estate laws, Illinois has reached into Texas to impose its regulatory scheme on Stroman, not for business Stroman does in Illinois, but for business Stroman does in Texas in interstate commerce. App. 56a, 58a. For example, every time a Texas resident calls Stroman about an Illinois timeshare property, Stroman is under threat of penalties for actions taken in Texas. If Stroman enters into its standard registration/advertising agreement, which is a personal service contract, with a Texas resident and the timeshare interval is in Illinois, Illinois claims Stroman is subject to fines even though the owner is a Texas resident. *See* App. 72a-73a. If Stroman accepts payment for its advertising services from a Texas resident without either escrowing the funds or obtaining a written authorization containing specific language mandated by Illinois, Stroman is subject to discipline even when the parties have agreed that their contract will be governed by Texas law. App. 45a-46a. If Stroman's newspaper advertisement or its web site is read by an Illinois resident, Stroman faces sanction. App. 72a-73a.

As Stroman explained, the burden grows even more onerous when other states apply their own regulatory schemes. This means that Stroman and its agents would, in addition to maintaining their existing licenses in Texas and obtaining licenses in Illinois, have to incur costs of obtaining and maintaining licenses in every other state claiming an interest in Stroman's activities. App. 55a. Likewise, Stroman would have to conform its contracts and escrow requirements in each transaction to the requirements of as many as four states per transaction, assuming that were possible. This

cumulative effect substantially impedes the flow of goods and services among the several states. *See* App. 55a-56a.

Two months after Stroman served its federal complaint, DFPR initiated an administrative action against Stroman. App. 71a-76a. In that action, DFPR sought fines against Stroman for activities during the time period of August 2000 through August 2005 that DFPR asserted required an Illinois real estate license. App. 72a-74a. Based on its after-filed administrative action, DFPR then moved the federal district court to abstain as a matter of comity under the *Younger* abstention doctrine. App. 13a-14a. The district court abstained and dismissed Stroman's complaint without prejudice based on its finding that Illinois had an important interest in enforcing its real estate licensing statutes. App. 18a-20a.[3] The district court undertook no analysis of whether the federal interest in a national economic union outweighed Illinois' asserted interest in regulating the real estate profession. *See id.*

3. The Decision Below.

The Seventh Circuit affirmed, finding that the court was required to abstain from interfering with the state administrative action that is "ongoing, judicial in nature

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[3]Stroman's suit was originally filed in the United States District Court for the Southern District of Texas. App. 13a. DFPR moved to dismiss for lack of personal jurisdiction and venue, failure to state a claim and abstention. *Stroman Realty, Inc. v. Grillo*, 2006 WL 492458 at *2 (S.D. Tex. Feb. 28, 2006). The district court transferred the action to the Southern District of Illinois. App. 13a.

and implicates the Department's important interest in regulating the real estate profession." App. 2a. The court rejected Stroman's assertion that because its case involved an important issue of national concern – that of an economic union – *Younger* abstention was inapplicable. App. 7a-8a. The court likewise rejected Stroman's argument that abstention should not apply when the administrative action was brought two months after the filing of the federal complaint when the relief sought in the federal action was wholly prospective and the resolution of the administrative action would not necessarily forestall further administrative actions against Stroman. App. 6a.

Thus, the court found that each component of the *Middlesex* test was met.[4] The court found that the administrative proceeding was "on-going" and that Stroman's "dormant Commerce Clause claim could [] be adequately addressed on judicial review in the event of an adverse administrative decision." *Id.* The court next determined that the state had an important state interest in "regulating timeshare brokerage activities involving Illinois residents or timeshare properties located within the state." App. 7a. Relying on *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), the court held that "Stroman's contention that the Department's attempt to regulate its business violates the dormant Commerce Clause in and of itself does not require us to forgo consideration of the State's interest in regulating the business of timeshare resales." App. 8a. The court

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[4] *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

then determined that the state interest in protecting Illinois consumers against "'evil, fraudulent, dishonest and incompetent practices'"[5] overwhelmed Stroman's federal claim because the "statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies" which are "different from the state regulation at issue in *Harper*, which the Fourth Circuit found aimed to limit access to the waste removal market." App. 8a-9a (emphasis in the original). The court did not address the Fourth Circuit's opinion in *Life Partners, Inc. v. Morrison*, 484 F.3d 284 (4th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 708 (Dec. 3, 2007).

Finally, the court found that abstention was required because no exceptional circumstances such as a pressing need for equitable relief existed. App. 9a-10a. The court rejected Stroman's argument that injunctive relief was necessary because it faced repeated investigation and administrative action as DFPR had only filed one administrative action against Stroman and that action remained pending. App. 10a.

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[5]DFPR has not accused Stroman of engaging in any such practices. It merely seeks to fine Stroman for conducting business without an Illinois license. App. 71a-74a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review to Resolve the Conflict Among the Circuits on the Application of *Younger* Abstention to Federal Claims Asserting Violation of the Commerce Clause.

A. Is Younger Abstention Required when the Federal Claim Involves a Core Attribute of the National Government Such as the Commerce Clause.

This Court should grant certiorari to resolve the conflict among the circuits regarding whether the federal courts must abstain under *Younger v. Harris*, 401 U.S. 37 (1971), when the federal litigation is premised on the state's violation of the dormant commerce clause – a purely federal claim implicating fundamental principles of national unity. None of this Court's decisions addresses this issue, and the circuit courts have diverged on this point. The Seventh Circuit applies *Younger* to commerce clause claims in the same manner as it would a case alleging procedural due process violations in the context of a state disciplinary proceeding. The Fourth Circuit, however, recognizes that cases alleging violation of the dormant commerce clause represent "a difference of kind, not merely of degree," justifying a "narrower view" of the asserted state interest, rendering *Younger* abstention inappropriate. *Harper v. Pub. Serv. Comm'n of West Virginia*, 396 F.3d 348 (4th Cir. 2005). Because important national interests are at stake, the door to the federal courthouse should remain open to such claims, particularly when the very purpose of *Younger* is to balance federal and state concerns.

When Congress enacted 42 U.S.C. § 1983, it determined that litigants asserting federal constitutional violations should have the option of a federal forum. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Litigants then sought to use this federal forum as a means to arrest state court proceedings. Thus, in *Younger*, the Court held that federal courts should not interfere with pending state criminal proceedings except under extraordinary circumstances. *Younger*, 401 U.S. at 41. The Court later expanded the doctrine to include ongoing noncriminal judicial proceedings when important state interests are involved. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Generally, the court may abstain from the federal case where there are ongoing state proceedings that: 1) are judicial in nature; 2) involve important state interests; and 3) provide an adequate opportunity to raise federal claims. *Middlesex County*, 457 U.S. at 432. Even where these criteria are met, the court will decline to abstain under certain circumstances, such as when the state proceeding is motivated by a desire to harass or is conducted in bad faith, there is an extraordinarily pressing need for immediate equitable relief, or the challenged provision flagrantly and patently violates express constitutional provisions. *Younger*, 457 U.S. at 54-55.

Abstention is not a jurisdictional bar, however. Rather, it is a policy premised on:

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance

> of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44. However, this Court has specifically noted that the concept of federalism:

> does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of *both* State and National governments.

Id. (emphasis added). Further, "'abstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citation omitted).

While comity is the primary consideration in abstention cases, this Court also has stressed the importance of protecting the peculiarly national interests embodied in the commerce clause. This Court observed that the commerce clause:

> "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among

> the Colonies and later among the States under the Articles of Confederation."

Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

Applying these principles, the circuit courts are divided as to whether *Younger* abstention is appropriate where the claim in the federal case involves important national interests under the commerce clause. The Fourth Circuit offers the more reasoned view in cases such as *Harper* and *Life Partners, Inc.* In *Harper*, the Fourth Circuit held that *Younger* abstention did not apply to a suit challenging a West Virginia agency's requirement that solid waste haulers obtain certificates of convenience and necessity before doing business in the state. In so doing, the court determined that "[t]he commerce power plays a role in abstention analysis quite different from many other provisions of the Constitution. The dormant Commerce Clause demonstrates a difference of kind, not merely of degree." *Harper*, 396 F.3d at 355. Thus, "the commerce power itself justifies a narrower view of state interests in the abstention context." *Id.* at 357.

The Fourth Circuit reached the same conclusion in *Life Partners, Inc.* There, the Virginia Bureau of Insurance issued a show cause order to a Texas-based viatical settlement provider requiring it to explain why the provider was conducting business with a Virginia resident without a state license. The provider sued in federal court under 42 U.S.C. § 1983, asserting that applying Virginia's Viatical Settlement Act to its business violated the commerce clause. The court of appeals affirmed the district court's refusal to abstain

because, while *Younger* requires "federal courts to refrain from interfering with ongoing state judicial proceedings that implicate important state interests", when the federal case involves "'an overwhelming federal interest-an interest that is . . . a core attribute of the national government . . . -no state interest, for abstention purposes can be nearly as strong at the same time.'" *Life Partners, Inc.*, 484 F.3d at 300 (citing *Harper*, 396 F.3d at 356). *See also In re Pan Am. Corp.*, 950 F.2d 839, 847 (2d Cir. 1991) (stating that "'the notion of "comity" . . . is "not strained when a federal court cuts off state proceedings that entrench upon the federal domain."'") (citation omitted).

The Fourth Circuit's approach properly considers both state and federal interests, in stark contrast to that of the Seventh Circuit in this case, as well as district courts within the First and Sixth Circuits. *See Hartford Enterprises, Inc. v. Coty*, __ F. Supp. 2d __, 2008 WL 54291 (D. Me. Jan. 3, 2008); *Marathon Petroleum Co. v. Stumbo*, 2007 WL 4163863 (E.D.Ky. Nov. 20, 2007). In the case below, the court rejected *Harper*, stating that "Stroman's contention that the Department's attempt to regulate its business violates the dormant Commerce Clause in and of itself does not require us to forego consideration of the State's interest in regulating the business of timeshare resales." App. 8a.

This split in the circuits is rooted in the courts' divergent readings of this Court's decision in *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). In *NOPSI*, the Court addressed whether *Younger* applied to a utility company's federal suit to invalidate a state rate making

authority's findings that the company was not entitled to full reimbursement for power plant costs, which the company argued was preempted by a FERC decision allocating costs among the participating companies. The company argued that *Younger* did not require abstention in the face of a claim that the state action was pre-empted by federal law and called into question the *Younger* prerequisite that states have a legitimate substantial interest in the pending proceedings. The Court characterized the company as arguing that "a district court presented with a pre-emption-based request for equitable relief should take a quick look at the merits; and if upon that look the claim appears substantial, the court should endeavor to resolve it." *NOPSI*, 491 U.S. at 364. The Court responded that:

> the *mere* assertion of a substantial constitutional challenge to state action will not *alone* compel the exercise of federal jurisdiction. (Citation omitted.) That is so because when we inquire into the substantiality of the State's interest in its proceeding we do not look narrowly to its interest in the *outcome* of the particular case-which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

Id. (first and second emphasis added).[6] The Seventh Circuit took this language to mean that the nature of Stroman's commerce clause claim could not factor into

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[6]The Court ultimately found *Younger* did not apply because there was no ongoing state proceeding that was judicial in nature.

the *Younger* analysis but that the state's purported interest in regulating real estate brokers was determinative. App. 7a-8a.[7]

The Fourth Circuit interpreted *NOPSI* differently. The *Harper* court acknowledged *NOPSI*'s statement that "assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction", but observed that while areas such as criminal law, insurance, zoning and the like may from time to time implicate constitutional provisions, there is no disrespect to federal-state relations in allowing state courts to address those constitutional questions. "This is because many constitutional provisions assign rights and responsibilities but do not themselves create any particular interests for states against their sister states, or vis-a-vis the national government." *Harper*, 396 F.3d at 355. *Harper* expressly noted that the state interest at stake in *NOPSI* was "*intrastate*" commerce. *Id.* at 356 (emphasis added). By emphasizing intrastate commerce when upholding *Younger* abstention, *Harper*

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[7]The court did not address the fact that Texas has an interest in regulating its own resident brokers and that principles of comity also weighed against any interest Illinois could have in regulating the conduct of brokers located and licensed in other states. *See, e.g., Scott/Hubbard Co., Inc. v. Sika Chem. Corp.*, 708 F. Supp. 945, 948 (N.D. Ill. 1989) ("Illinois' interest in regulating finders domiciled here is greater than New Jersey's interest in extending its licensing requirement outside its own jurisdiction."). Indeed, the only acts Stroman arguably performs in Illinois are the dissemination of direct mail and advertising in national and local press. These are at best, however, "only tenuous connections with" Illinois. *See Stroman Realty, Inc. v. Antt*, 20 F. Supp. 2d 1050, 1054 (S.D.Tex. 1998).

suggests that this Court implicitly acknowledged that *interstate* interests factor into the abstention analysis. *Id.* Declining to abstain, the Fourth Circuit recognized that "[n]o state's dignity could be offended by acknowledging the obvious point that the Framers consciously withdrew interstate commerce from the vast collection of interests that remain the primary responsibility of the states." *Id.* at 355.[8]

The Third Circuit takes a similar approach in cases where the plaintiffs raise preemption-based federal claims. As did *Harper*, the court in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), took heed of *NOPSI*'s statement concerning the "mere assertion of a substantial constitutional challenge", but recognized that the court's "'focus should not be on *whether* a federal claim has been presented, but rather on the *nature* of that claim.'" *Hi Tech Trans*, 382 F.3d

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[8]*Harper* took *NOPSI*'s statement that courts should look to the importance of the generic proceedings to the state rather than the state's interest in the outcome of a particular case to mean that "the characterization of state interests should not be general to the point of rendering the *Middlesex County* test meaningless, or specific to the point of rendering the state interest trivial." *Harper*, 396 F.3d at 354. *Harper* quotes *NOPSI*, wherein the Court observed that "'[t]he appropriate question here is not whether Louisiana has a substantial, legitimate interest in reducing NOPSI's retail rate below that necessary to recover its wholesale costs, but whether it has a substantial, legitimate interest in regulating intrastate retail rates.'" *Id.* (quoting *NOPSI*, 491 U.S. at 365). Thus, *Harper* determined that West Virginia's requirement that solid waste haulers receive certificates of convenience and necessity did not "concern 'improper disposal of solid waste'" but "who has the right to contract with towns, businesses, and individuals in West Virginia to remove that waste . . . ." *Harper*, 396 F.3d at 355.

at 307 (citation omitted). Federal preemption claims therefore "'require[] review of the state interest to be served by abstention, in tandem with the federal interest that is asserted to have usurped the state law'" and "'[t]he determination of whether abstention is proper where preemption is alleged does not rest upon whether the preemption claim ultimately will prevail.'" *Id.* (citations omitted). *See also Ford Motor Co. v. Ins. Comm'r of Com. of Pa.*, 874 F.2d 926, 934 (3d Cir. 1989) ("Although Pennsylvania's interest in the regulation of its insurance industry is significant, there exists a countervailing significant federal interest in insuring [sic] the unhindered enforcement of federal law.").

This Court should grant certiorari to resolve this split in the circuits and answer the question unresolved in this Court's *NOPSI* analysis: Unlike administrative actions where a litigant asserts constitutional rights such as due process, does a claim premised on the commerce clause weigh against *Younger* abstention in light of the important federal interests at stake.[9] *See*

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[9]That the analysis of a federal claim based on the commerce clause calls for a different analysis is demonstrated by the cases on which the lower court relied. For example, in *Green v. Benden*, 281 F.3d 661 (7th Cir. 2002) (App. 5a), an Illinois psychologist filed a federal action alleging that Illinois administrative hearings to suspend his Illinois license violated his due process and equal protection rights. Unlike that proceeding, federal interests are heightened where, as here, a Texas business conducting business exclusively in Texas, having personal service contracts with Texans and residents of other states, files suit to enjoin another state from regulating its business in Texas and is only then made a respondent to a state administrative action. Cobbling together the various extensions of *Younger* to deprive the Texas plaintiff of its chosen federal forum in these circumstances is itself offensive to our federal system. Indeed, this Court has recognized that "[t]he various types of

Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 490 (4th Cir. 2007) (observing that "extraterritorial laws disrupt our national economic union just as surely as 'customs duties'" and that "[t]he compliance costs that such laws impose undermine the Commerce Clause's objective of a 'national common market.'") (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) and *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977)).

B. Whether the Nature, not the Merits, of the Federal Claim Should be Considered by the Court in Analyzing the Propriety of Abstention Under Younger.

The circuits also are divided as to what consideration, if any, the federal court should give to the merits of the commerce clause claim itself in determining whether to abstain. Again, the circuits part ways in reading *NOPSI*. There, the Court rejected the notion that "a district court presented with a pre-emption-based request for equitable relief should take a quick look at the merits; and if upon that look the claim appears substantial, the court should endeavor to resolve it." *NOPSI*, 491 U.S. at 364.

To the extent the Seventh Circuit thought the commerce clause warranted any consideration, it decided that Stroman's commerce clause claim was not

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abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n. 9 (1987).

as strong as that in *Harper*. *See* App. 8a (distinguishing *Harper*, stating that "we do not think the Department's interest is one which, by its very nature, unduly burdens interstate commerce.").[10] In so doing, the court looked to the asserted state interests and concluded that "the statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies."[11] App. 9a (emphasis in original).

The Seventh Circuit's analysis is contrary to the Fourth Circuit's in *Harper* and *Life Partners*. Indeed, in *Life Partners*, the court *rejected* the plaintiff's commerce clause challenge while *affirming* the lower court's refusal to abstain. In upholding the trial court's abstention ruling, the Fourth Circuit characterized the issue as whether Virginia was authorized to regulate

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[10]The district court in *Hartford Enterprises, Inc. v. Coty* followed the Seventh Circuit's lead, suggesting *Harper* should only apply where the state law at issue "'by its very nature served to impede interstate commerce.'" *Hartford Enterprises, Inc.*, __ F. Supp. 2d ___, 2008 WL 54291, at *3 n. 4 (quoting *Martinez*) (App. 8a.). The district court in *Marathon Petroleum Co., LLC v. Stumbo* likewise viewed *Harper* as limited and analyzed the plaintiffs' commerce clause challenge as the Sixth Circuit did federal preemption claims, that is, whether the plaintiffs "presented a facially conclusive claim that the Kentucky Act violates the dormant Commerce Clause." *Marathon Petroleum Co.*, 2007 WL 4163863, at *9. This "patently unconstitutional" analysis appears to be based on the *Middlesex* exception to abstention rather than the comity and federal principles addressed in *Harper* and *Life Partners*.

[11]The court's characterization of the state action is erroneous. Illinois did not seek to enforce its real estate laws. Rather, it sought, through the administrative action, to impose fines on Stroman.

viatical settlements "and if not, whether Virginia's regulations violate the dormant Commerce Clause." *Life Partners*, 484 F.3d at 301. *Life Partners* did not ask whether Virginia's licensing and regulatory requirements posed only "incidental burdens" on out-of-state businesses - that was a merits determination, *not* a factor in considering whether the case should have proceeded in federal court in the first place. *Compare Life Partners*, 484 F.3d at 301 *with* App. 9a. *See also Hi Tech Trans*, 382 F.3d at 308; *Ford Motor Co.*, 874 F.2d at 935 n. 12 ("[t]he decision that abstention is improper in light of" an asserted preemption claim "need not result in a finding that the state statute has in fact been preempted."). Nor did the Fourth Circuit's refusal to abstain in *Harper* turn on the merits of the court's finding that the regulations at issue in that case served to "impede interstate commerce", as the Seventh Circuit implies. App. 8a. The *Harper* court only reached the merits of the commerce clause challenge because the lower court refused to abstain – it was not part of the Fourth Circuit's analysis in its determination that abstention would have been improper.[12]

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[12]Indeed, given the complex, fact specific nature of the commerce clause analysis, it is inappropriate for a court to determine the merits of the claim - before any answer is filed or discovery undertaken - in deciding whether the federal court will even hear the case. Such cases are akin to those where preliminary issues such as personal jurisdiction are "'intertwined with the merits'" of the case and "'ultimately have to be resolved at trial.'" *Brown v. Slenker*, 220 F.3d 411, 418-19 (5th Cir. 2000) (citation omitted) (holding that district court erred in resolving disputed factual issues that went to the issue of both personal jurisdiction and the merits of the underlying action and that resolution of these facts should have gone to the jury).

Whether a court should consider the *nature* of a claim, as the Third and Fourth Circuits do, rather than the *merits* of a federal claim in analyzing whether to abstain pursuant to *Younger* is a question this Court has not squarely addressed. This Court should reconcile the conflict between the circuits and, like the Fourth Circuit, determine that claims brought under the commerce clause are appropriately resolved in federal court, with an assessment of the merits of the commerce clause challenge made independently from the abstention analysis.

II. This Court Should Address the Issue of Whether Administrative Actions Filed After a Federal Plaintiff has Filed Suit in Court Constitutes an "Ongoing State Judicial Proceeding" Compelling *Younger* Abstention.

This Court has never addressed whether an after-filed administrative proceeding constitutes an "on-going judicial proceeding" requiring *Younger* abstention. The relative ease with which administrative proceedings can be instituted, their lack of procedural safeguards, restricted discovery and inability to consider constitutional claims until later court review, renders such proceedings far different from those involving a criminal prosecution instituted in state court shortly after the federal suit began. To blindly apply the same result to civil administrative proceedings ignores the significant distinctions pertinent to criminal law and the traditional importance of the enforcement of those laws to the states. This Court's rulings do not support such an expansion of *Younger*.

Thus, in *Hicks v. Miranda*, 422 U.S. 332 (1975), this Court held that abstention was appropriate because of the privity between the federal plaintiff and the defendants in a previously filed criminal state court proceeding. *Hicks*, 422 U.S. at 349. In so ruling, the Court commented that the federal proceedings had not progressed to "proceedings of substance on the merits." *Id.* Likewise, in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court held *Younger* abstention was required where a state court criminal proceeding "was commenced the day following the filing of the federal complaint." *Doran*, 422 U.S. at 929. The Court held that the act of filing the federal complaint could not insulate the federal plaintiff from prosecution for violation of state law. *Id.* Finally, in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), this Court extended *Younger* to administrative proceedings. The Court held that abstention was proper where court review of constitutional issues was available on review of the administrative decision when the federal court action was brought *after* the institution of the administrative proceedings for the purpose of enjoining those proceedings. *Dayton Christian Schools, Inc.*, 477 U.S. at 629.

Here, the court held that when an administrative action is filed after the federal plaintiff has brought suit in federal court, the federal court may divest itself of jurisdiction so long as eventual court review of the administrative proceeding is available.[13] This rule,

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[13]None of this Court's opinions compels the result reached by the Seventh Circuit in this case. The Seventh Circuit relied on *Hicks* and Seventh Circuit law to extend *Younger* to after-filed

however, bars federal plaintiffs from obtaining the judicial review that Congress directed federal courts to undertake when constitutional violations are alleged. Permitting a state agency to avoid federal court review of its unconstitutional conduct for essentially the price of a stamp guts the purpose of section 1983 and ignores the significant distinctions between state court criminal proceedings, which formed the bases for this Court's rulings in *Hicks* and *Doran*, and the administrative proceedings at issue here. First, states have a paramount interest in their criminal prosecutions and they are not lightly undertaken. Second, in a state court, the defendant can still raise its federal constitutional questions under the protections of the court system and can do so immediately.[14] By contrast, when a defendant faces a state administrative

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administrative actions. As in *Hicks*, however, each of the Seventh Circuit cases relied on by the *Stroman* panel involved a subsequently filed state court action, not an administrative proceeding. *See Forty One News, Inc. v. County of Lake*, 491 F.3d 662, 663 (7th Cir. 2007); *Mannheim Video v. County of Cook*, 884 F.2d 1043, 1043 (7th Cir. 1989); and *Ciotti v. County of Cook*, 712 F.2d 312, 312 (7th Cir. 1983).

[14] *Steffel v. Thompson*, 415 U.S. 452 (1974), further supports the conclusion that after-filed administrative actions should not bar access to federal court relief. In *Steffel*, the Court recognized that "[w]hen no state criminal proceeding is pending at the time the federal complaint is filed" *Younger* is inappropriate because "federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." *Steffel*, 415 U.S. at 462. Similarly, none of these concerns is implicated by refusing to abstain based on an after-filed administrative action.

proceeding it cannot raise the constitutional question until subsequent court review and even then, the review may be substantially restricted, as here, to the record before the agency.[15]

The result of the Seventh Circuit's rule dumps cases involving important federal constitutional questions into state administrative tribunals that are not equipped to decide them and compels a federal litigant to wait for eventual state court review on the constitutionality of the statute the agency seeks to enforce thus placing the federal plaintiff between the "Scylla of intentionally flouting state law" and the "Charybdis" of foregoing "constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). The facts in this case demonstrate the error of such a broad application of *Younger*.

Here, Stroman had done business in the same manner for twenty-five years before it had any inkling that Illinois intended to enforce its laws extraterritorily. One month after it received the cease and desist letter from Illinois' DFPR, Stroman sued to vindicate its federal rights under the commerce

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[15]Judicial review is limited to the evidence in the administrative record, and no new evidence may be considered, although constitutional questions are heard *de novo*. 735 Ill. Comp. Stat. 5/3-110. The agency's factual findings are deemed "prima facie true and correct." *Id.* The court on review may affirm or reverse the agency's decision, or remand the case for additional evidence. *See* 735 Ill. Comp. Stat. 5/3-111. Under Illinois law, "administrative agencies do not have judicial authority to determine the constitutionality of the legislation they are charged with enforcing." *Dombrowski v. City of Chicago*, 842 N.E.2d 302, 307 (Ill. App. 2005) (citations omitted).

clause.[16] DFPR waited nearly another two months before instituting its administrative proceeding against Stroman. Extending *Hicks* to Stroman with its after-filed state administrative proceeding and ignoring *Hicks'* distinctive and determinative condition of plaintiff-defendant privity and a state criminal action turns the threshold *Middlesex* question of whether there is an ongoing state judicial proceeding at the time of the filing of the federal complaint on its head.

As the four justice dissent expressed in *Hicks*, "[t]he Court's new rule creates a reality which few state prosecutors can be expected to ignore. It is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."

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[16]Stroman had no reason –or ability– to bring suit prior to receipt of the cease and desist notice because it was not under any threat of prosecution. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983) (complaint failed to allege an Art. III case or controversy where it alleged only abstract injury instead of alleging that respondent "'sustained or [was] immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" 461 U.S at 101-102). The circuits are consistent that *Younger* does not bar a federal claim where administrative action has been threatened. *See Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042, 1048 (8th Cir. 1997) (holding that there were no ongoing proceedings for purposes of *Middlesex* where a state agency had determined that Planned Parenthood's proposed new center was reviewable under its Certificate of Need regulations); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir. 1995) (district court's finding of no ongoing state proceedings in a case where a letter had issued alleging violations did not constitute an abuse of discretion); *accord, Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1227-28 (4th Cir. 1989).

Hicks, 422 U.S. at 357 (Stewart, J., dissenting). That is precisely what happened in this case. Given the substantial distinctions between criminal court proceedings with their attendant rights and the limited rights provided to administrative agency respondents, this Court should address this issue of substantial importance and limit the application of *Younger* to those civil cases where a federal court plaintiff seeks to enjoin administrative agency proceedings instituted before the filing of his federal suit.

III. This Court has Never Addressed Whether Plaintiffs are Required to Pursue State Court Review of Agency Decisions Either Before or to the Exclusion of a Federal Action Under 42 U.S.C. § 1983 Seeking Prospective Injunctive Relief.

The Seventh Circuit's extension of *Younger* warrants particular attention from this Court because it imposes a requirement that potential civil rights plaintiffs pursue state court review of administrative actions thus precluding their federal claims from being heard in federal court. However, this Court has never determined that state court review of the initial agency action is required before a litigant may present a claim in federal court under 42 U.S.C. § 1983. Where a party seeks prospective relief from future enforcement of a state's laws, the reasoning of *Wooley v. Maynard*, 430 U.S. 705 (1977), should apply, and *Younger* should not bar suit in federal court.

In *NOPSI*, the state had argued that just as the state's trial-and-appeals process is treated as a unitary system for *Younger* purposes and prevents federal

intervention mid-process, "where the initial adjudicatory tribunal is an agency . . . the litigation from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no more permitted at the conclusion of the administrative stage than during it." *NOPSI*, 491 U.S. at 369. Because the agency proceeding was legislative, rather than judicial in nature, the Court did not decide that issue and made it clear that it had not done so in its prior cases. *Id.* at 370 n. 4. The Court observed that *Middlesex County Ethics Comm'n* and *Dayton Christian Schools* were the only Supreme Court cases involving administrative proceedings, and in both cases, the agency actions were ongoing at the time the plaintiffs filed their federal suits. *NOPSI* noted that although *Dayton*'s alternative argument that federal challenges could be made upon appeal to state courts "suggests, *perhaps*, that an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final . . . [*W*]*e have never squarely faced the question.*" *Id.* (emphasis added).

In the case below, the court determined that even if the Illinois administrative proceeding did not provide Stroman the opportunity to assert its commerce clause claim, Stroman could raise its constitutional issues upon state judicial review. App. 6a. The Seventh Circuit has therefore mandated a requirement that whenever state agency administrative proceedings are initiated, the private party must exhaust his administrative remedies in the state proceeding and raise his claims only in state court. While this result appears to be condoned in

Dayton, 477 U.S. at 627 n. 2, it is inconsistent with the Court's later statement in *NOPSI* set forth above.[17]

The Seventh Circuit's approach warrants special attention from this Court because of its potential to bar 42 U.S.C. § 1983 plaintiffs from ever asserting their claims in federal court. Where a party participates in an administrative action and the judicial review that results in a state court judgment, the state court decision is afforded full faith and credit under 28 U.S.C. § 1738. However, this Court has not decided whether claim preclusion will apply to bar a plaintiff's constitutional claims brought under section 1983 where the plaintiff participated in an earlier administrative action but did not engage in state court review. Although in *Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986), the Court found that an agency's fact finding could apply in a subsequent section 1983 action, *see Elliott*, 478 U.S. at 796-99, it has never held that an unreviewed state administrative decision either precludes a party's subsequent action under section 1983 or bars a party from questioning the agency's authority to regulate it.[18]

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[17]The court in *Dayton* did not elaborate on why a different result should obtain with respect to exhaustion of administrative remedies where a proceeding is coercive versus remedial. *Dayton*, 477 U.S. at 627 n. 2. Given Congress' express grant of authority via section 1983 for federal court review, there is no justification for such a distinction.

[18]Nor did this Court address the issue in *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). *Astoria* addressed whether claimants under the Age Discrimination in Employment Act were collaterally estopped from relitigating in federal court judicially unreviewed findings of a state administrative agency. The Court

This has left the circuits to disagree as to whether a party to an administrative proceeding must litigate all claims in that action through judicial review or retains the ability to bring a section 1983 action in federal court when there are no state court proceedings pending, with the Third and Eleventh Circuits reaching conclusions opposite from those of the Ninth. Thus, in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993), a Pennsylvania Civil Service Commission affirmed a borough's decision to suspend and later terminate a police officer's employment. The officer declined to appeal either of these decisions in state court. The Third Circuit held that while administrative fact finding is entitled to preclusive effect, the same does not hold true for unreviewed questions of law. Therefore, the Commission's unreviewed legal determination that the officer's public criticism of his superior officer was unprotected by the First Amendment did not prevent him from bringing suit under 42 U.S.C. § 1983. *Edmundson*, 4 F.3d at 192.

Similarly, the Eleventh Circuit has held that:

> With respect to the claim preclusive effect of unreviewed state agency rulings, we conclude that the importance of the federal rights at issue, the desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed state administrative proceeding, and the limitations of state agencies as adjudicators of federal civil

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restricted its analysis to issue preclusion, and ultimately found that, in any event, preclusion principles did not apply.

> rights override the lessened federalism concerns implicated outside the contours of the full faith and credit statute.

Gjellum v. City of Birmingham, 829 F.2d 1056, 1064 (11th Cir. 1987).

In contrast, the Ninth Circuit in *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994), held that an administrative agency's decision is binding as to both factual and legal issues and that administrative rulings bar subsequent section 1983 claims even where the party does not seek state court review. *See also DeSario v. Thomas*, 139 F.3d 80, 87 (2d Cir. 1998), *vacated on other grounds, Slekis v. Thomas*, 525 U.S. 1098 (1999) (recognizing that "[t]he Circuits are split on whether a federal suit arising out of the same transaction(s) as a state administrative decision that has not been reviewed in state court is barred by res judicata.").

Coupled with this uncertainty, the Seventh Circuit's extension of *Younger* means that whenever the state administrative action has been initiated, the section 1983 plaintiff must pursue any potential constitutional claims in that state's administrative process, effectively closing the federal forum to these claims. Thus, through *Younger*, the federal courts may shrug off Congress' determination that jurisdiction for section 1983 cases properly lies in the federal forum. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law,

'whether that action be executive, legislative, or judicial.'") (citation omitted); *see also Felder v. Casey*, 487 U.S. 131, 142 (1988) ("[I]t [is] plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of [section 1983] recovery, to submit their claims to the government responsible for their injuries.").

Requiring exhaustion of administrative remedies and barring section 1983 plaintiffs from federal courts is inappropriate when the plaintiff requests prospective relief to prevent future enforcement actions. Here, the Illinois administrative action, initiated after Stroman filed suit, attempted to impose administrative fines for alleged past violations of Illinois' real estate regulatory scheme over a five-year period. App. 71a-74a. It did not attempt to enjoin any future activity. Thus, even if Stroman simply agreed to pay the administrative fines sought, there would be no effect on a future enforcement action, nor would Stroman be protected from future enforcement if the agency failed to prove the violations alleged.

The Seventh Circuit's application of *Younger* is contrary to this Court's precedent rendering *Younger* irrelevant to cases seeking relief from future prosecutions. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the plaintiff had previously been prosecuted and convicted for concealing the portion of his license plate that read "Live Free or Die". He did not appeal the convictions and subsequently brought suit for injunctive relief. Affirming the district court's holding that *Younger* abstention did not apply, the Court reasoned:

> [T]he suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. . . . The Maynards seek only to be free from prosecutions for future violations of the same statutes. Younger does not bar federal jurisdiction.

Wooley, 430 U.S. at 711.

This Court should grant certiorari to synchronize its holding in *Wooley* with *Dayton Schools* to address whether *Younger* applies to federal cases seeking prospective injunctive relief and to what extent, if any, federal court plaintiffs must participate in the state administrative and judicial review process before proceeding in federal court. The Seventh Circuit's position requiring exhaustion of administrative remedies, thereby barring plaintiffs from ever bringing their claims in a federal forum, demonstrates a pressing need for this Court to address these issues, particularly in cases such as Stroman's, which does not fit into any of the rubrics described in this Court's prior case law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 06-3214

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STROMAN REALTY, INC., Plaintiff-Appellant,

v.

DEAN MARTINEZ, Secretary of the Illinois Department of Financial and Professional Regulation,[1] Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 06 C 1187--Robert W. Gettleman, Judge.

March 30, 2007, Argued
October 10, 2007, Decided

COUNSEL: For STROMAN REALTY, INCORPORATED, Plantifff - Appellant: Leslie A. Powell, Frederick, MD.

For DEAN MARTINEZ, Secretary, Defendant - Appellee: Mary E. Welsh, OFFICE OF THE ATTORNEY GENERAL, Civil Appeals Division, Chicago, IL.

JUDGES: Before EASTERBROOK, Chief Judge, and BAUER and WILLIAMS, Circuit Judges.

OPINION BY: WILLIAMS

OPINION

WILLIAMS, Circuit Judge. Stroman Realty, a national timeshare brokerage company, was notified by the Illinois Department of Financial and Professional Regulation that it had been conducting unlicensed brokerage activities that involved Illinois residents and property as well as timeshare developers that had offices in the state. Stroman continued its activities, against the Department's instructions, and filed for injunctive relief in federal court from the Department's enforcement of its regulations. The basis of Stroman's complaint was that such enforcement violated the dormant Commerce Clause. The Department subsequently filed an administrative complaint with the State's Office of Banks and Real Estate against Stroman to enforce Illinois licensing requirements and then moved to dismiss Stroman's federal complaint. The district court granted the Department's motion on abstention grounds.

We agree with this decision as we believe that the district court was required to abstain from interfering with a state proceeding that is ongoing, judicial in nature, and implicates the Department's important interest in regulating the real estate profession. We also find that the state proceeding affords Stroman an adequate opportunity to raise its federal claims. Since this case presents no exceptional circumstances that would warrant federal court intervention, we affirm.

I. BACKGROUND

Stroman bills itself as the world's largest resale broker of vacation resort timeshares, maintaining a database of

over one million property buyers, sellers, and renters. Stroman's business is built around a computer listing system that allows it to match buyers with timeshares. When a sale is made, Stroman mails contracts to the buyer and seller, and these transactions often involve parties and properties in multiple states, including Illinois. Stroman runs its operation out of Conroe, Texas, and employs sales associates that hold only Texas real estate licenses.

On May 10, 2005, the Illinois Department of Financial and Professional Regulation mailed a cease-and-desist letter to Stroman's Texas office. The letter notified Stroman that the Department had received a complaint from an Illinois resident and had subsequently discovered that Stroman was engaged in timeshare brokerage activities in Illinois without the required licensure. In particular, the Department accused Stroman of (1) soliciting Illinois citizens in the purchase, sale, and rental of timeshare properties and (2) maintaining client relationships with Illinois citizens, timeshare developers who owned timeshares in Illinois, and timeshare developers with business offices located in Illinois. The letter instructed Stroman to either obtain an Illinois license or to stop doing business in Illinois.

Stroman responded on June 13, 2005, by seeking injunctive relief from the Department's enforcement of its licensing requirements in a federal court in the Southern District of Texas. Stroman's complaint alleged that the Department's attempted regulation of its timeshare resale brokerage business violated the dormant Commerce Clause of the Constitution. The Department, in turn, filed an administrative complaint

against Stroman in which it alleged that, from August 1, 2000, until August 1, 2005 (the date of the Department's filing), Stroman had been engaged in timeshare resale brokerage in Illinois without a license in violation of the state's Real Estate Timeshare Act of 1999, 765 Ill. Comp. Stat. § 101/15-70(a), and the Real Estate License Act of 2007, 225 Ill. Comp. Stat. § 454/20-10(a). The administrative complaint charged Stroman with (1) serving as a timeshare resale agent for owners of property physically located in Illinois and for developers whose business offices were located in Illinois, and (2) offering its timeshare resale services to Illinois citizens via mail and newspapers. The Department sought the assessment of a civil penalty of up to $ 25,000 against Stroman. See 765 Ill. Comp. Stat. § 101/15-25.

After filing its administrative complaint, the Department moved to dismiss Stroman's federal lawsuit citing the district court's lack of personal jurisdiction, improper venue, and failure to state a claim. The Department also argued that, because of the pending administrative action, the district court should abstain from deciding the case. The district court agreed that it lacked personal jurisdiction over the Department and transferred the case to the Northern District of Illinois. There, Stroman moved for a default judgment or, alternatively, to stay the administrative proceeding, which the district court denied.[2] The Department then filed an amended motion to dismiss, which the district court granted without prejudice. Stroman appeals.

II. ANALYSIS

The district court did not reach the merits of Stroman's dormant Commerce Clause challenge, deciding instead that abstention was appropriate in light of the pending state court proceeding against Stroman. As the Supreme Court explained in *Younger v. Harris*, 401 U.S. 37, 43 (1971), this doctrine of abstention reflects Congress's "desire to permit state courts to try state cases free from interference by federal courts," except in special circumstances. Therefore, federal courts must abstain from enjoining or otherwise interfering in ongoing state court proceedings that are (1) judicial in nature, (2) involve important state interests, and (3) provide an adequate opportunity to raise the federal claims, as long as (4) no exceptional circumstances exist that would make abstention inappropriate. *Green v. Benden*, 281 F.3d 661, 666 (7th Cir. 2002) (citing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 436-37 (1982)). We review de novo the district court's dismissal of Stroman's complaint on abstention grounds, *Majors v. Engelbrecht*, 149 F.3d 709, 712 (7th Cir. 1998), and begin by addressing the least controversial prongs of the *Middlesex* framework in this case, (1) and (3).

A. The Proceeding Is Ongoing and Judicial in Nature.

It is uncontested that the state proceeding at issue is judicial in nature, as the motivating factor behind the Department's filing of its complaint was to enforce its real estate licensing requirements against Stroman. *See id.* at 712 (for *Younger* abstention purposes, administrative proceedings are judicial in nature when they are coercive, such as state enforcement

proceedings). Yet Stroman disagrees that this proceeding should be characterized as "ongoing" since the Department filed its administrative complaint *after* Stroman filed its claim in federal court. But the precise timing and order of the Department's filing is less important than the extent to which the federal proceedings had progressed when the state proceedings began. *Younger* abstention has been held to apply when state proceedings begin after a federal complaint is filed, "but before any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda*, 422 U.S. 332 (1975); *see also Forty One News, Inc. v. County of Lak* , 491 F.3d 662, 666-67 (7th Cir. 2007) (court's resolution of Rule 12(b)(6) motion did not constitute a proceeding of substance on the merits); *Mannheim Video v. County of Cook*, 884 F.2d 1043, 1045-46 (7th Cir. 1989) (same); *Ciotti v. County of Cook*, 712 F.2d 312, 313-14 (7th Cir. 1983) (same, for court's determination that plaintiff had standing to sue). When the Department filed its administrative complaint against Stroman, no "proceedings of substance" had occurred as the Department had yet to respond to Stroman's complaint in federal court . Therefore, for purposes of abstention, we consider the state proceeding at issue to be ongoing. We also conclude that this state proceeding provides Stroman with an adequate opportunity to raise its federal constitutional claim. In *Green*, an Illinois court's review of the administrative proceeding was determined to provide the plaintiff with an adequate opportunity to raise his due process and equal protection challenges. 281 F.3d at 666. We see no reason why Stroman's dormant Commerce Clause claim could not also be adequately addressed on judicial review in the event of an adverse administrative decision. *See* 225

Ill. Comp. Stat. § 454/20-75 (subjecting all final decisions of the Office of Banks and Real Estate to judicial review).

B. An Important State Interest Is Involved and No Exceptional Circumstances Exist.

Having resolved that the state proceeding is ongoing, judicial in nature and can adequately address Stroman's claims, we consider whether it involves an important state interest. *See Green*, 281 F.3d at 666. The Department asserts that is has a legitimate, substantial interest in regulating timeshare brokerage activities involving Illinois residents or timeshare properties located within the state. But Stroman contends that Younger is inapplicable when an important *federal* interest is implicated. Stroman's argument is similar to the one rejected by the Court in *New Orleans Pub. Serv., Inc. ["NOPSI"] v. Council of New Orleans*, 491 U.S. 350, 364-65 (1989), in that it essentially asserts, in light of its dormant Commerce Clause challenge, that the federal court should peek ahead to the constitutional issue and attempt to resolve it. In *NOPSI*, the Court responded to the petitioner's argument that abstention was inappropriate if a federal court was presented with a "substantial claim" that federal law preempts the challenged state action by stating, "[T]he mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction." *Id.* Therefore, when inquiring into whether abstention is required, the Court explained that "we do not look narrowly to [the State's] interest in the *outcome* of the particular case-which could arguably be offset by a substantial federal interest in the opposite outcome.

Rather, what we look to is the importance of the generic proceedings to the State." *Id.* at 365. So Stroman's contention that the Department's attempt to regulate its business violates the dormant Commerce Clause in and of itself does not require us to forgo consideration of the State's interest in regulating the business of timeshare resales.

Alternatively, Stroman urges us to adopt the view that the Department's enforcement of the State's licensing requirements improperly limits access to the real estate brokerage market. In support, Stroman cites to *Harper v. Public Service Commission of West Virginia*, 396 F.3d 348, 354-55 (4th Cir. 2005), where abstention was deemed inappropriate in the face of a dormant Commerce Clause challenge because the State's licensing requirements did not reflect a valid interest in preventing the improper disposal of waste, but rather, "*by its very nature* serve[d] to impede interstate commerce." But we do not think the Department's interest is one which, by its very nature, unduly burdens interstate commerce.

According to the Department, its regulation of real estate professionals serves "to protect Illinois consumers against evil, fraudulent, dishonest and incompetent practices, to ensure a minimum level of competence and familiarity with the State's applicable laws, and to assess the fitness to practice based on character and trustworthiness." The Department has a legitimate and substantial interest in setting and enforcing the standards for those who deal with property sales involving its citizens. *See, e.g., Coldwell Banker Residential Real Estate Servs. of Ill., Inc. v. Clayton*, 475 N.E.2d 536 (Ill. 1985) (the State has a

"substantial interest in regulating the real estate profession"); *see also Thompson v. Schmidt*, 601 F.2d 305, 308 (7th Cir. 1979) (a given state has a "legitimate and substantial interest" in setting the qualifications for professions that require special skills and affect the general welfare). At best, Stroman has argued that the statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies. This is different from the state regulation at issue in *Harper*, which the Fourth Circuit found aimed to limit access to the waste removal market. In addition, as we noted in *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539 (7th Cir. 2001), a state has no basis for invoking *Younger* if it seeks to enforce an invalid interest, such as the regulation of activities under exclusive federal control. In this case, however, the Department's interest does not concern the regulation of an activity that is under exclusive federal control, nor does it, as the district court pointed out, fall under an area of even partial federal control. *See Stroman v. Grillo*, 438 F. Supp. 2d 929, 934-35 (N.D. Ill. 2006). Rather, we find that the proceeding involves a valid, legitimate state interest-the regulation of real estate professionals engaged in the business of timeshare brokerage-and thereby meets the second abstention prong.

Based on the above findings, abstention is required unless Stroman can demonstrate any exceptional circumstances that would require federal intervention. *See Green*, 281 F.3d at 666. For example, when "(1) the state proceeding is motivated by a desire to harass or is conducted in bad faith, (2) there is an extraordinarily pressing need for immediate equitable relief, or (3) the challenged provision is flagrantly and patently violative

of express constitutional prohibitions," federal intervention in the state proceeding is appropriate. *Jacobson v. Village of Northbrook Mun. Corp.* 824 F.2d 567, 569-70 (7th Cir. 1987) (internal quotations and citations omitted). Stroman has shown no exceptional circumstances that warrant reversing the district court's decision to abstain.

First, there is no indication that the Department filed its complaint in bad faith. We are not troubled by the timing of the filing, after Stroman filed its federal complaint, because by that point it presumably became evident to the Department that Stroman did not plan to comply with the cease-and-desist letter by discontinuing its brokerage practices. Nor do we find that there exists an "extraordinarily pressing need" for equitable relief in the form of a federal injunction. Stroman claims that it will face repeated investigation and administrative action, subjecting it to a $25,000 fine for each act of allegedly regulated conduct. To date, however, only one administrative action has been filed against Stroman, and because that action remains pending, no fines have been assessed against it. Stroman also claims that its reputation will suffer from the implication that it is operating illegally. Without more, however, such speculation does not rise to the level of irreparable harm that would justify the intervention of a federal court.

Finally, the statute is not of the type that we would consider to be "flagrantly and patently" violative of the Constitution. *See Younger*, 401 U.S. at 54 ("[T]he *possible* unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it . . . ." (emphasis added)).

III. CONCLUSION

For the reasons outlined above, the judgment of the district court is AFFIRMED.

Footnote(s)

[1] After this appeal was filed, Dean Martinez replaced Fernando Grillo as the Secretary of the Illinois Department of Financial and Professional Regulation. We therefore substitute Dean Martinez as the Appellee in this action. *See* Fed. R. App. P. 43(c).

[2] At oral argument, Stroman represented that neither party has pushed the state administrative action forward, and, as far as we know, it remains pending.

No. 06 C 1187

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

STROMAN REALTY, INC., Plaintiff,

v.

FERNANDO E. GRILLO, Secretary of the Illinois Department of Financial and Professional Regulation, Defendant.

July 18, 2006, Decided
July 18, 2006, Filed

COUNSEL: For Stroman Realty, Inc., Plaintiff: Leslie A. Powell, Diana M. Schobel, Law Offices of Leslie A. Powell, Frederick, MD; Gerald M Birnberg, Williams Birnberg & Andersen, Houston, TX; Jose A. Lopez, Schopf & Weiss, Chicago, IL; Veronica Gomez, Schopf & Weiss LLP, Chicago, IL.

For Fernando E Grillo, Defendant: Rachel Jana Fleischmann, Yolanda L Ricks, Illinois Attorney General's Office, Chicago, IL.

JUDGES: Robert W. Gettleman, Judge.

OPINION BY: Robert W. Gettleman

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Stroman Realty, Inc. ("Stroman"), filed a complaint in the Southern District of Texas against Defendant Fernando E. Grillo, Secretary of the Illinois Department of Financial and Professional Regulation ("Illinois"), seeking to enjoin Illinois from enforcing the Illinois Real Estate Licensing Act of 2000 ("Licensing Act"), 225 Ill. Comp. Stat. 454 and the regulations thereunder against Stroman for conducting its timeshare resale business. Stroman alleges that Illinois's enforcement of the Licensing Act, as applied to Stroman, violates the Commerce Clause. U.S. Const., § 8, cl. 3.

Following a complaint from an Illinois resident, Illinois's Department of Financial and Professional Regulation ("IDFPR") sent Stroman a cease and desist letter, listing alleged activities Stroman had engaged in that required a real estate license in Illinois. Stroman subsequently filed a lawsuit in the United States District Court for the Southern District of Texas for preliminary injunctive relief against Illinois's enforcement of the Licensing Act against Stroman. Illinois then brought a formal administrative complaint against Stroman for violating the Licensing Act and the Illinois Timeshare Act, 765 Ill. Comp. Stat. 101 (2006). Illinois alleged that Stroman acted as a real estate agent in the State of Illinois without a license. Stroman moved to stay the administrative action in the Texas case. That case was transferred to this court, which denied the motion to stay. Illinois has now moved to dismiss pursuant to F.R.C.P. 12(b)(6) and F.R.C.P. 12(b)(1), arguing that Stroman's allegations do not constitute a constitutional violation, and that this court should abstain from exercising jurisdiction based on the Younger doctrine. Younger v. Harris, 401 U.S. 37

(1971). For the reasons discussed herein, Illinois's motion to dismiss is granted.

FACTS

Plaintiff Stroman resells property timeshare intervals on the secondary market. Timeshare intervals allow a buyer to purchase the right to use a property or unit for a specified interval of time. They are typically sold or exchanged for the use of vacation resort properties. Stroman is located in Texas and is, along with its sales associates, licensed to engage in real estate brokering by the state of Texas.

Stroman operates a computerized listing service to match potential timeshare buyers to sellers. If a seller wants to advertise and list his timeshare with Stroman, he signs an advertising agreement. Stroman charges sellers a one-time advertising fee to list their timeshare intervals in its computer system and imposes a commission fee upon the completion of a successful sale. Stroman employs 80 sales associates to handle phone calls from potential buyers and sellers. The sales associates attempt to match a potential buyer's timeshare interval preferences, such as the duration, location, and price of the timeshare interval, to a timeshare listed in the computer system. Stroman also operates an internet website which allows users to view available timeshare intervals and obtain relevant information. The internet user can submit an offer through the website or can call the company to speak with a sales associate.

Stroman's business transactions frequently involve parties and properties residing in multiple states. For

example, Stroman might match a New York buyer with a Nebraska seller for a timeshare interval located in California. Stroman's sales associates field approximately 1,000 calls daily from across the country, some of which require inquiry into timeshare interval properties located in several states. To facilitate its business activities, the company solicits buyers, sellers and potential referral sources, such as real estate agencies and developers, of timeshare intervals. To do so, Stroman advertises its services nationally and internationally. Stroman places daily advertisements in national, regional, and local newspapers, as well as advertising in specialty magazines, trade publications, and on the internet. The company also conducts large amounts of direct mail solicitations. Most of Stroman's advertisements generically promote its timeshare resale services rather than individual timeshare intervals.

STANDARD OF REVIEW

Rule 12(b)(1) motions are premised on either facial or factual attacks on jurisdiction. Villasenor v. Indus. Wire & Cable, Inc., 929 F.Supp. 310, 311 (N.D.Ill. 1996). If the defendant makes a factual attack on the plaintiff's assertion of subject matter jurisdiction, it is proper for the court to look beyond the jurisdictional allegations in the complaint and "view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Capital Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) (per curiam); Barnhart v. United States, 884 F.2d 295, 296 (7th Cir. 1989). The Supreme Court has held that an attempt to plead a federal claim fails only where it "clearly appears to be immaterial and made solely for the purpose of

obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L.Ed. 939 (1946).

DISCUSSION

Illinois has moved to dismiss arguing that: (1) Stroman's complaint, on its face, does not state a claim for a violation of the dormant Commerce Clause; and (2) this court should refrain from exercising jurisdiction under the Younger[1] abstention doctrine. Because this court finds that abstention is warranted, there is no need to discuss the merits of Stroman's dormant Commerce Clause argument. See Moses v. Kenosha County, 826 F.2d 708, 710 (7th Cir. 1987) (dismissal without decision regarding constitutional claims is appropriate procedure when Younger abstention applies); Green v. Benden, 281 F.3d 661, 666 (7th Cir. 2002) (merits of challenge to denial of plaintiff's request for injunctive relief not needed because Younger abstention was appropriate).

ABSTENTION

The Younger doctrine originally held that federal courts should abstain from hearing a challenge to the constitutionality of a state criminal statute when the plaintiff bringing the challenge is being prosecuted in a state court for violating that statute. Younger, 401 U.S. 37. Due to "principles of comity and federalism . . . federal courts should refrain from enjoining state criminal prosecutions." Jacobson v. Vill. of Northbrook Mun. Corp., 824 F.2d 567, 569 (7th Cir. 1987). Younger is "fully applicable to civil proceedings in which important state interests are involved," Moore v. Sims,

442 U.S. 415, 423 (1979), and has subsequently been held to apply to state administrative proceedings, Ohio Civil Rights Comm'n. v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 (1986). Thus, Younger abstention "requires federal courts to abstain from enjoining ongoing state proceedings that are (1) judicial in nature, (2) implicate important state interests, and (3) offer an adequate opportunity for review of constitutional claims, (4) so long as no extraordinary circumstances exist which would make abstention inappropriate." Green v. Benden, 281 F.3d 661, 666 (7th Cir. 2002) *citing* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 436-37; Majors v. Engelbrecht, 149 F.3d 709, 711 (7th Cir. 1989). When a plaintiff in federal court, after having already filed a complaint, becomes a defendant in a state criminal proceeding, Younger abstention still applies so long as the federal court has not engaged in any "proceedings of substance on the merits." Hicks v. Miranda, 422 U.S. 332 (1975). See also Majors, 149 F.3d at 713.

First, with regard to timing, Stroman argues that because the administrative action was filed *after* Illinois was served with Stroman's federal complaint, Younger abstention is inappropriate. After the Supreme Court's holding in Hicks, however, the timing of the filing of the state and federal court lawsuits is largely unimportant, provided the federal suit has not progressed to any "proceedings of substance on the merits." See Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975) (abstention proper when federal suit is still in an "embryonic stage"); Ciotti v. County of Cook, 712 F.2d 312, 313 (7th Cir. 1983) (decision on standing is not a decision on the merits). The instant case has clearly not progressed to the merits. In Ciotti, the Seventh Circuit cited with

approval Giulini v. Blessing, 654 F.2d 189, 193 (2d Cir. 1981), and Nevin v. Ferdon, 413 F. Supp. 1043, 1049 (N.D. Cal. 1976), which both found abstention proper when the only action taken by the federal court was a ruling on jurisdiction or jurisdiction and abstention. This is analogous to the current case. The District Court for the Southern District of Texas transferred the case to this court after an examination of jurisdiction, but no ruling on Stroman's dormant Commerce Clause claim has been made by either court. The only action this court has taken was to deny Stroman's request to stay the state court's administrative action. The denial did not address Stroman's substantive claim. Thus, no "proceedings of substance on the merits" have occurred in this litigation.

Because the timing of the lawsuits is not an issue, the question is whether the state proceedings meet the test for Younger abstention. First, the proceedings initiated through Illinois's administrative complaint are clearly judicial in nature. "For the purposes of Younger abstention, administrative proceedings are 'judicial in nature' when they are coercive - i.e., state enforcement proceedings." Majors, 149 F.3d at 712 (citations omitted). "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." New Orleans Pub. Serv., Inc., v. Council of City of New Orleans, 491 U.S. 350, 370-71 (1989) *citing* Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908).

In the instant case, Illinois was clearly attempting to enforce the Licensing Act when it filed the administrative complaint against Stroman. The

proceedings were coercive, not remedial. Additionally, the procedures governing the hearing conform to the definition of a judicial inquiry. The Licensing Act requires an investigation of those accused of violating the act. 225 Ill. Comp. Stat. 454/20-60. The investigation is reviewed for merit and notification is given to the accused that disciplinary proceedings are to be initiated. Id. The Real Estate Administration and Disciplinary Board ("Board") of the Office of Banks and Real Estate ("OBRE") then hears the charges and the accused and complainant may be represented by counsel and present "statements, testimony, evidence and argument." Id. The Board and OBRE possess subpoena powers over "any persons or documents for the purpose of investigation or hearing . . . in the same manner as prescribed by law for judicial procedure in civil cases in the courts of [Illinois]." Id. The administrative proceeding conducted by the OBRE is clearly of an investigatory and judicial nature. It deals with prior events and applies present law. Thus, the administrative action initiated against Stroman was "judicial in nature."

Nor is there any question that regulation of the real estate profession is an important state interest. States have traditionally possessed the power to regulate the conduct of professionals and implement licensing schemes. Goldfarb v. Va. State Bar, 421 U.S. 773, 792-93 (1975). States have "a legitimate and substantial interest in prescribing reasonable, in the constitutional sense, qualifications for professions or occupations which require special knowledge or skill and intimately (affect) the public health, morals, order, or safety, or the general welfare." Thompson v. Schmidt, 601 F.2d 305, 308 (7th Cir. 1979) (citations and quotations

omitted). Efforts by states to "preserve professional integrity" should be treated with deference. Scariano v. Justices of Supreme Court of State of Ind., 38 F.3d 920, 924 (7th Cir. 1994). Although no court has considered whether licensing real estate professionals is an important state interest, courts have found regulation of other professions to meet this standard.[2] Clearly, regulating the real estate profession is a traditional and important state interest.

Stroman argues that abstention is improper because Illinois's interest in regulating the real estate profession does not outweigh the federal government's interest in preventing trade barriers in interstate commerce. Stroman cites Midwestern Gas Transmission Co. v. McCarty, 270 F.3d 536, 539 (7th Cir. 2001), and Harper v. Pub. Serv. Comm'n of W. Va., 396 F.3d 348, 357 (4th Cir. 2005), for support. Those cases, however, are inapplicable to the instant case.

In Midwestern Gas, the Midwestern Gas Transmission Company ("Midwestern") sought to enjoin the Southern Indiana Gas and Electric Company ("SIGECO") and Indiana Utility Regulatory Commission ("IURC") from engaging in state prosecutorial proceedings against it. SIGECO wanted the IURC to require Midwestern to receive permission before connecting its pipeline to two Indiana industrial gas users who wanted to use the pipes to transport out-of-state natural gas into Indiana. Midwestern had received approval from the Federal Energy Regulatory Commission ("FERC") prior to the initiation of the IURC proceedings. The Seventh Circuit held that Younger abstention was not appropriate because the federal Natural Gas Act created dual state-federal

jurisdiction over the sale and distribution of natural gas. The Natural Gas Act granted FERC exclusive jurisdiction over the interstate transportation of natural gas. "[I] f for example [the state] is seeking to regulate activities that clearly are under exclusive federal control, then there is no basis for invoking *Younger*." Midwestern Gas, 270 F.3d at 539.

The regulation of those acting as real estate professionals in Illinois, however, as Illinois points out, is not an activity under either exclusive federal control or dual state-federal jurisdiction. Rather, it is an important and traditional state interest. "The [Younger] doctrine presupposes that the state has a valid interest that it is seeking to enforce" which, unlike Midwestern Gas, is present here. Id.

In Harper, Southern Ohio Disposal ("SOD") brought suit against The Public Service Commission of West Virginia ("PSC") to enjoin the PSC from barring SOD from competing with waste removal companies in West Virginia. Under West Virginia law, a common carrier such as SOD was required to obtain a "certificate of convenience and necessity" from the PSC to operate in the state. Applicants for the certificate had to show that the company already providing service in the area was not "adequately serving the same territory." This requirement effectively granted a monopoly to waste haulers who already had a certificate for an area. The Fourth Circuit held that the state interest protected by the certificate requirement was "limiting access to the waste removal market" because a "limitation on market access to maintain exclusive franchises for existing enterprises" is not comparable to legitimate neutral

regulation. Harper, 396 F.3d at 350, 355 *citing* PSC. W. Va. Code Ann, § 24A-3-3(a) (Michie 2004).

The Illinois Licensing Act, in contrast, does not create a virtual monopoly for present real estate license holders. Stroman is able to obtain a license without regard to any other license holder. 225 Ill. Comp. Stat. 454. Pointedly, the Harper court recognized that regulation of business professionals such as insurance agents and state/local housing code enforcement are important state interests. Harper, 396 F.3d at 352-53. Thus, the Harper court would no doubt view licensure of real estate professionals in the same light.

Additionally, the OBRE's administrative proceeding offers an adequate opportunity for review of Stroman's constitutional claims. "Subsequent judicial review is a sufficient opportunity." Majors, 149 F.3d at 713 *citing* Dayton Christian Sch., 477 U.S. at 629. The Licensing Act states that "final administrative decisions of OBRE shall be subject to judicial review pursuant to the provisions of the Administrative Review Law." 225 Ill. Comp. Stat. Ann. 454/20-75. When reviewing an administrative agency's decision under the Administrative Review Law, 735 Ill. Comp. Stat. Ann. 5/3-101, the Appellate Court of Illinois independently reviews the agency's conclusions of law according to a *de novo* standard, including any constitutional issues brought on appeal. Home Interiors and Gifts, Inc. v. Dep't of Revenue, 318 Ill. App. 3d 205, 209-10 (1st Dist. 2000). Stroman thus has a definite and adequate opportunity to bring its constitutional claim in Illinois state court.

Stroman argues that it is not required to raise its constitutional claim in state court because Illinois has no compulsory counterclaim rule, citing Peregrine Fin. Group, Inc. v. Martinez, 712 N.E. 2d 861, 868 (Ill. App. 1999). Peregrine involved an arbitration agreement and is not relevant with regard to a state administrative proceeding. In any case, Green counsels that it is irrelevant whether the constitutional claims are actually raised in state court, because the "federal court should assume that the state procedures will afford an adequate remedy." Green, 281 F.3d at 667 *citing* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987). Thus, it matters not whether Stroman must raise a constitutional claim; it is sufficient that it can do so.

Finally, there are no extraordinary circumstances that would make Younger abstention improper. Because the present circumstances satisfy the three Younger requirements, abstention is inappropriate only if: "(1) the state proceeding is motivated by a desire to harass or is conducted in bad faith; (2) there is an extraordinarily pressing need for immediate equitable relief; or (3) the challenged provision is flagrantly and patently violative of express constitutional prohibitions." Jacobson, 824 F.2d at 569-70 (citations and quotations omitted). The exceptions to enforcing the Younger doctrine are extremely narrow. Arkebauer v. Kiley, 985 F.2d 1351, 1358 (7th Cir. 1993). None of these elements are present in this case.

Illinois's administrative proceeding was not brought in bad-faith or to harass. This prong "requires more than a mere allegation and more than a 'conclusory' finding." Grandco Corp. v. Rochford, 536 F.2d 197, 203 (7th Cir. 1976). Stroman makes no allegation that

OBRE's conduct was harassing or in bad-faith. Nor does Stroman have an extraordinarily pressing need for immediate equitable relief. Stroman has argued that it has and will continue to suffer irreparable harm as a result of Illinois's enforcement of the Licensing Act and claims it will face "continued administrative actions." Pl.'s Resp. Br., 15. Stroman does not specify whether the actions will be from the OBRE in Illinois or from real estate licensing agencies in other states. The administrative action itself, however, will not cause Stroman irreparable injury. Although a negative outcome in the administrative hearing and state court might be adverse to Stroman, it is not for this court to say whether Stroman will succeed in those forums. Merely appearing at the administrative hearing or appealing in state court will not cause irreparable harm or injury.

Nor is the Licensing Act flagrantly and patently unconstitutional. For this requirement to be met, a statute must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Pincham v. Ill. Judicial Inquiry Bd., 872 F.2d 1341, 1350 (7th Cir. 1989) *citing* Younger, 401 U.S. at 53-54 *citing* Watson v. Buck, 313 U.S. 387 (1941). "[T] he possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith efforts to enforce it." Id., 872 F.2d at 1350. The Licensing Act is not so flagrantly unconstitutional as to fit this description. Although Stroman claims that the Act violates the constitution as applied to it, the Act is clearly constitutional as applied to the vast majority against whom it is applied.

Finally, Stroman has also argued that abstention in this circumstance would require exhaustion before it could assert a federal claim, citing Patsy v. Bd. of Regents of State of Fla., 457 U.S. 496 (1982). However, the Supreme Court in Dayton Christian Schools determined that the application of the Younger doctrine to state administrative proceedings is compatible with Patsy, which held that administrative remedies need not be exhausted prior to the initiation of a § 1983 lawsuit in federal court. "Unlike Patsy, the administrative proceedings [in Dayton Christian Schools] are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest." Dayton Christian Sch., 477 U.S. at 627 (n. 1). This exactly describes the instant case.

While it is true that Younger abstention is a narrow doctrine reserved only for exceptional circumstances, when the requirements of Younger are met, "abstention is not only permissible but expected." Hogsett, 43 F.3d 290 at 294 *citing* Younger, 401 U.S. at 37 (1971). Accordingly, this court grants Defendant Illinois's motion to dismiss based on Younger abstention.

CONCLUSION

For the reasons discussed herein, the court abstains from exercising jurisdiction, and dismisses the instant case without prejudice.

ENTER: July 18, 2006

Robert W. Gettleman
United States District Judge

Footnote(s)

[1] Younger v. Harris, 401 U.S. 37 (1971).

[2] See e.g. Trust & Inv. Advisers, Inc. v. Hogsett, 43 F.3d 290, (7th Cir. 1994) (regulating securities investment); Gilbertson v. Albright, 381 F.3d 965, 969 (9th Cir. 2004) (land surveyors); Van Breeman v. Zollar, 1997 WL 124266 (N.D. Ill. 1997) (professional engineers); Baffert v. Cal. Horse Racing Bd., 332 F.3d 613, 618 (9th Cir. 2003) (horse racing).

No. 06-3214

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STROMAN REALTY, INC., Plaintiff-Appellant,

v.

DEAN MARTINEZ, Secretary of the Illinois Department of Financial and Professional Regulation, Defendant-Appellee.

November 19, 2007, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 06 C 1187. Robert W. Gettleman, Judge.

JUDGES: Before HON. FRANK H. EASTERBROOK, Chief Judge; HON. WILLIAM J. BAUER, Circuit Judge; HON. ANN CLAIRE WILLIAMS, Circuit Judge.

ORDER

On consideration of the petition for panel rehearing and for rehearing en banc filed by Plaintiff-Appellant on October 24, 2007, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing is DENIED.

Filed 6/14/2005
Civil Action No. H05-2066

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

STROMAN REALTY, INC. Plaintiff,

v.

FERNANDO E. GRILLO
Secretary of the Illinois Department of Financial and Professional Regulation, Defendant.

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, Stroman Realty, Inc. ("Stroman"), avers and alleges as follows:

PARTIES
The Plaintiff

1. Stroman is a corporation organized and existing under the laws of the State of Texas with its principal place of business at 14500 Hwy 105 West, Conroe, Texas 77304. Stroman is a real estate broker licensed under the laws of the State of Texas. It is engaged in the interstate and international business of brokering timeshare resales, as well as related activities. The nature of its business is more fully described in paragraphs 17 through 32 infra.

The Defendant

2. Defendant, Fernando E. Grillo, is the Secretary for the Department of Financial and Professional Regulation for the State of Illinois ("DFPR" or "Illinois"). Through its Division of Banks and Real Estate, DFPR enforces the Real Estate License Act of 2000, codified at 225 Ill. Comp. Stat. Ann. 454 and the Real Estate Timeshare Act of 1999, codified at 765 Ill. Comp. Stat. Ann. 101. Mr. Grillo's principal place of business is located at 100 West Randolph Street, FL 009 C-9, Chicago, Illinois 60601.

JURISDICTION AND VENUE

3. Pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, this action is being brought for preliminary and permanent injunctive relief against enforcement of statutes and regulations of the State of Illinois in violation of the Commerce Clause, Article 1, § 3 clause 8 of the Constitution of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

4. Venue is proper in this district under 28 U.S.C. § 1391(b). Defendant seeks to and/or has enforced the statutes and regulations of the State of Illinois against Stroman, whose sole business office is located in the Southern Judicial District of Texas. Enforcement of these statutes and regulations will have and has had a significant adverse impact on the business of Stroman in the Southern District of Texas, on the clients and potential clients of Stroman who reside in the Southern District of Texas, and on interstate and international commerce. In addition, a substantial part of the events or omissions giving rise to the claims alleged herein

occurred in the Southern District of Texas. Stroman has had and has clients who reside in the Southern District of Texas and own or are or were interested in purchasing or selling timeshare facilities located in Illinois. These clients and other potential clients residing in the Southern District of Texas will be deprived of their right to use the real estate broker of their choice to resell or purchase timeshare facilities located in Illinois in the secondary market and will have their ability to participate in the national secondary market for timeshare resales significantly reduced if enforcement of the laws challenged herein is not enjoined.

RELATED CASES

5. There are two cases pending before this Court in which Stroman Realty, Inc. is the plaintiff where the same Commerce Clause allegations are raised. One is against the officials of the States of California and Florida and is styled, *Stroman Realty, Inc. v. Jim Antt, Jr., et al.*, Case No. H-98-0283. That case is before the Honorable Lynn Hughes. The other is *Stroman Realty, Inc. v. Elaine Richardson*, Case No. 05-CV1203, and is against the State of Arizona.

THE BUSINESS OF VACATION RESORT TIMESHARE RESALES

6. The concept of purchasing time intervals for the use of vacation resort facilities was introduced in the 1960s and continues to enjoy increasing popularity in the United States and around the world today. The concept is frequently referred to as "timeshare," "intervals" or "vacation ownership." In a timeshare

transaction, the buyer typically purchases the right to use a specified unit or type of unit in a resort during a specified time interval or season. For example, a buyer can purchase the right to use a specific living unit and related amenities in a Colorado resort during the period of January 1 through January 7 for a one-time fixed price plus periodic maintenance fees. This right to use the unit can be extended in perpetuity or for a fixed period of time. The right to use the facility may be evidenced by a deed, a lease or by other methods. If the developer is successful, it will sell the remaining weeks to others.

7. A major source of a timeshare's value is the ability to exchange the right to use the facility with other timeshare owners in the United States and throughout the world. Ex. 1 at 2. The availability of exchanges is the single most important motivating factor leading to timeshare sales. Exchanges are facilitated through major companies, such as RCI and Interval International, that specialize in coordinating national and international exchanges. Almost all of the timeshare resorts in the United States are associated with either RCI or Interval International, and together they serve approximately 3 million members in coordinating national and international exchanges.

8. The timeshare business was a $5 billion industry in 1996 involving such companies as Marriott, Hyatt, Hilton, Ramada, Disney, Embassy Suites, Sheraton, Radisson and Hampton. In 2002, timeshare developers alone sold approximately $5.5 billion in timeshare intervals in the United States which compromises nearly 60% of timeshare sales worldwide in timeshares in 2002. Ex. 2 at 6. Nationally, consumer resales

compromised $390 million. Ex. 2 at 9. As of January 1, 2003, there are approximately 1,590 timeshare vacation resorts located in 47 states in the United States. Ex. 2 at 3. As of 2002, there were more than 5,425 timeshare resorts worldwide. Ex. 3 at 1. The states with the largest numbers of timeshare vacation resorts are Florida, California, South Carolina, Hawaii, Nevada and North Carolina. Ex. 2 at 4. A 1997 Report by the American Resort Development Association ("ARDA Report"), the largest timeshare developer trade association in the world, contains a table showing the location of timeshares by state. Ex. 1 at 82-83. In 1997, almost 90% of timeshare owners were first-time buyers of new units. According to a 2002 report, 60% of the timeshare intervals sold worldwide were new intervals sold by developers. Ex. 2 at 6.

9. There are three timeshare resorts in Illinois, WorldMark, Family Resorts and Travel, f/k/a New Horizons ("New Horizons") and Silverleaf Resorts. One of these, Silverleaf Resorts, is part of a system with resorts in six states. An owner of one of these timeshares can rent or exchange his interest with one of Silverleaf's 100,000 members nationwide. WorldMark and New Horizons are vacation clubs and are part of nationwide networks. For example, WorldMark has more than 200,000 members nationwide who can exchange their vacations without the necessity of going through an exchange company.

10. Illinois is one of the leading states in the United States for timeshare owners. According to a 1997 study, Illinois residents owned 51,243 timeshares throughout the United States.

11. For many reasons, such as adverse economic changes in a person's life, loss of interest, medical limitations, divorce, death, and maturation of children, many owners of timeshare intervals need to or want to resell their intervals. The 1997 ARDA Report found that 46% of timeshare owners are interested in selling one or more of their timeshares. Ex. 1 at 53. To facilitate these resales a secondary market in timeshare resales has developed. Potential purchasers in the resale market for vacation timeshares are located throughout the country and the world.

12. The vast bulk of timeshare resale buyers live outside the state where the use facility is located. For example, in 1997, only 13.9% of the timeshare units in Florida were owned by Florida residents (Ex. 1 at 41, 90-91), and a limited survey of 1997 closed resale transactions showed that in every state but two, more than 72% of the buyers lived in a state different than the property location.

13. Resale prices are generally substantially less than the original purchase price. However, since the resale market is diverse and the result of individual negotiation, it is impossible to predict the sales price of any specific interval and there are no standards by which to do so. The average cost of a timeshare unit purchased from a developer between August 2001 to July 2002 was $14,200, as compared to an average resale purchase price of $5,000. Ex. 2 at 10-11. As of 2000, approximately 15% of current owners purchased on the United States resale market. Ex. 2 at 9.

14. While Stroman and others in the secondary timeshare resale market try to promote the facilitation

of resales as an extra benefit to resort owners, many of the resort developers regard resales as unwanted competition and have worked to discourage the growth of the resale market. These resort owners are motivated by the fact that a person marketing a lower priced resale is marketing exactly the same product that the resort owner is marketing at full price. Ex. 2 at 10-11. For example, if use of a resort unit is divided into 52 one-week intervals for marketing purposes, the initial purchaser from the resort owner has rights to use the exact same living space, furniture and facilities as the buyer of a different interval in that same timeshare unit on the secondary market at a much lower price. As a result, some resort owners do not permit resale of their timeshare units and others try to discourage resales and seek to impede the functioning of independent brokers such as Stroman. For example, typically resort owners will not allow "for sale" signs the number one real estate sales tool according to the National Association of REALTORS® on timeshare units. If a timeshare unit owner is unable to sell his unit, the resort owner may repossess it and resell it, thereby obtaining windfall profits. As of 1997, 58% of 1,204 timeshare resorts did not provide any resale programs for their timeshare owners.

15. Because of the specialized nature of the timeshare resale market and the almost prohibitive cost of marketing a timeshare on a small scale, most traditional real estate salespersons are not equipped to handle this secondary market nor are they interested in doing so. Unique problems associated with resales that non-specialized real estate agents are generally not equipped to handle include the need for national advertising to generate sales, the agent's lack of

familiarity with the many timeshare options such as deeded, fixed time, quarter shares, fractional ownership, biannual ownership, floating time, points, seasons, and right-to-use, the agent's need to coordinate with resort management to obtain accurate information and assure that the transfer will be recognized, the difficulty in obtaining title insurance and the need to contact specialized firms to do so if title insurance is available at all, and the need to coordinate a closing between residents of distant states for a timeshare often located in a third state.

16. Of the initial prices of vacation timeshares, anywhere from 30% to 65% of the price of a new sale covers the cost of marketing, promotion and advertising by the resort owner. Likewise, effective marketing to potential domestic resale purchasers requires a constant program of nationwide advertising and promotion. The existence of strong independent brokers willing and able to pursue a large-scale nationwide marketing program is essential to the existence of a viable resale market given the geographic dispersion of potential buyers and sellers, the resistance of resort owners to resales, the fact that 58% of resort owners offer no resale assistance to their interval owners, and because non-specialized real estate salespersons are ill-equipped to handle timeshares.

STROMAN'S BUSINESS

17. Stroman is the world's largest vacation resort timeshare resale broker. Operating from its purpose-built 16,000 square foot headquarters in Conroe, Texas, Stroman has approximately 80 licensed real estate agents to handle approximately 1,000 incoming

telephone calls daily from potential buyers and sellers located throughout the country and the world.

18. Founded by its President Wayne Stroman in 1979, Stroman began to specialize in the timeshare resale market in the early 1980's. Since the Multiple Listing Service used by traditional real estate brokers is limited to a local market and has no category for timeshares, Wayne Stroman recognized the need to develop a new computerized system that could be used for marketing of timeshare resales. Thus, in order to maximize the potential of the secondary timeshare resale market, Wayne Stroman developed a sophisticated computer marketing system called the CTLS Computer System ("CTLS"). Specially tailored to the timeshare resale market, the CTLS permits Stroman to match buyer's demands with the features of a seller's timeshare interval by considering such factors as location, price, amenities and use interval. The CTLS runs on over 130 networked computers at Stroman's headquarters, and its database includes over 1 million resort property buyers, sellers and renters.

19. In order to participate in the resale market on any substantial basis, the resale broker must advertise on a national and international basis. This market imperative derives from the fact that potential buyers and sellers are located throughout the country and the world; most prospective buyers are not fully aware of the options available; and each interval is a unique product because of factors such as its location, time slot, view, size, point systems, amenities and price. Thus, a major continuous effort is required to develop a database of potential buyers and sellers that is as broad as possible in order to facilitate sales. Stroman creates

and maintains profiles of timeshare desired by prospective buyers who contact Stroman, which can be matched with timeshare owners who advertise through Stroman.

20. The critical importance of national and international advertising and promotion to this secondary market is illustrated by the distribution of buyers who purchased timeshares through Stroman. Stroman has sold timeshares located in all of the 47 states where timeshares have been developed. Stroman has sold intervals to buyers and for sellers from all of the fifty states. Over the years, only one state accounted for 10% of the buyers, three states each accounted for from 7 to 8% of the buyers, one state accounted for 5%, one accounted for 4% and Texas accounted for 8.4%.

21. Stroman advertises every day in national, international, regional and local media with a circulation ranging from 15 to 24.5 million readers. Stroman advertises daily in USA Today and frequently in newspapers in most major markets such as the New York Times, Washington Post, Chicago Sun Times, Boston Globe, Toronto Globe, Toronto Sun, Dallas Morning News, Houston Chronicle, Baltimore Sun, and a host of others. In addition, Stroman advertises in over a dozen specialty magazines and trade publications and conducts the largest direct mail operation in the resale industry. Stroman's direct mail solicitations (over 4.5 million pieces annually each year for the past ten years) target potential buyers and sellers as well as potential referral sources such as real estate agencies and developers. Stroman spends millions of dollars each year on its advertising and promotional efforts and has

an active Internet site that promotes its services worldwide and currently advertises timeshares throughout the United States.

22. Stroman's internet web site identifies resorts and the types of intervals for sale at each resort, including the attributes of the interval. A computer user is free to browse the site for various timeshares to determine if there is an interval he wishes to purchase. A potential purchaser can make an offer over the internet or call one of Stroman's licensed Texas real estate agents.

23. With the exception of internet advertising and periodic inserts into direct mail pieces, each of Stroman's advertisements is generic, advertising its resale services rather than specific timeshare intervals. This approach is dictated by the sheer number of properties in the database and the need to meet print deadlines that would make specific property listings obsolete. Some examples of Stroman's advertisements and promotional material are attached hereto as Exhibits 4, 5, 6, and 7.

24. Each of Stroman's Sales Associates is a licensed real estate salesperson or broker in the State of Texas and a member in good standing of the National Association of REALTORS®. As such, they are bound by the statutes and regulations of the State of Texas and the Code of Ethics and Standards of Practice of the National Association of REALTORS®. Both the laws of the State of Texas and the Code of Ethics and Standards require honesty by a real estate agent and prohibit false or misleading representations. Stroman and its agents have a stellar reputation with the Texas Real Estate Commission.

25. Stroman's Sales Associates interview potential buyers and sellers by using prepared scripts that have been submitted to the Texas Attorney General, the Texas Real Estate Commission, and the Secretary of State for the State of Texas. When Stroman receives a call from a potential timeshare seller a licensed real estate agent obtains the vital information about the facility from the caller, including information about maintenance fees and special requirements for transfer. The information is entered into the CTLS computer system. When the seller enters into an advertising agreement with Stroman, he is charged a one-time advertising fee of $499 which registers property in the CTLS system for three years and includes internet advertising of that interval as well as the benefits of Stroman's generic advertising. In addition, the seller may agree to pay a commission of 10% or a minimum of $850, whichever is greater, when the timeshare is sold. Charges to non-U.S. clients are slightly higher.

26. The advertising fee is critically necessary to generate interstate resales of timeshares through

Stroman's multimillion dollar advertising and promotional efforts. No interval could support its own nationwide advertising campaign; for example, a one week four line advertisement in the Timeshare classified section in USA Today costs $1,060 or between $260 and $316 per day, depending on the day. An individual owner would quickly spend more than the value of his timeshare at these rates. Given the high cost of advertising and promotion, and the relatively low sales prices of and commissions from timeshare resales, effective advertising can only be supported by pooling the advertising fees of timeshare resellers. Thus, the advertising fee paid by a seller to Stroman supports the pool of funds required for the massive marketing campaign designed to attract as many potential market participants as possible. In the absence of such a pool of participants, the 46% of timeshare owners who want to sell would find their options severely limited.

27. When a potential buyer calls Stroman, a licensed real estate Sales Associate develops a profile of what the buyer is looking for in terms of time interval, location, resort project, amenities and price and tries to match the profile through the CTLS system with intervals that are being offered. Thereafter, the Sales Associate will try modifying profile elements until something close to the buyer's profile is located. The buyer is then sent a list of profiles that most closely match his request. If the buyer wants to make an offer on an interval, the seller is contacted. The Sales Associate assists in the negotiations until the parties agree to a sale or negotiations are otherwise concluded.

28. On any given day, Stroman agents speak to approximately 1,000 different people who reside in numerous states and outside the Unites States. A caller may inquire about different timeshares available in several different states during the same call. For example, a New York resident may inquire about an Illinois based timeshare owned by a Colorado resident and also a California based timeshare owned by an Illinois resident during the same phone call.

29. When a buyer and seller reach agreement, the buyer is sent a contract and asked to make an earnest money deposit along with returning the signed contract to Stroman in Texas. Once the buyer's contract is received in Texas, the seller is sent a contract for execution and return to Stroman in Texas. The buyer's offer is accepted when the seller's executed contract is received in Texas. The contracts provide that they are to be governed by the law of the location of the escrow agent. Stroman generally uses the law firm of Rice, Rice & Rice, P.C., of Conroe, Texas as the escrow agent, but may use a different agent depending on the Rice firm's ability to handle the title insurance and title work relating to the closing. The Rice firm, or other closing agent then takes care of the remaining matters necessary for closing, including any special requirements of the developer, POA, exchange company, or management company.

30. In this interstate market for timeshare resales, the vast majority of sales involve two or more states. The process by which Stroman acquires property information from sellers, contacts buyers and facilitates sales is all part of a unitary course of interstate commerce protected by the Commerce Clause Art. 1, § 8 of the Constitution of the United States.

31. Stroman does not have, and has never had any office in the State of Illinois or in any state other than Texas. It has no employees or general agents in Illinois and does not send employees or agents to Illinois with the exception of attending an occasional trade show or convention.

32. Stroman has been conducting its interstate business essentially as described above for over two decades. Only in recent years have state governments actively sought to impose their regulatory schemes on Stroman in a manner that will force Stroman out of business. In the past, however, Stroman has withdrawn from doing business with residents of one or more states that accounted for a negligible amount of its business when regulatory authorities insisted that Stroman be licensed in the state.

THE POSITION OF ILLINOIS

33. Illinois has taken the position that Stroman and its salespersons are required to obtain Illinois real estate broker's and salesperson's licenses and comply with all of its laws and regulations if Stroman conducts activities with respect to timeshare resales that involve Illinois citizens as sellers, renters or buyers of a timeshare interest, regardless of the location of the

timeshare interest, or if the timeshare is located in Illinois, regardless of the residence of the potential buyer or seller. Exhibit 8. This would also require Stroman to register with the Illinois Secretary of State and obtain a certificate of authority to transact business in Illinois before filing an application for a broker's license. Ill. Admin Code. tit. 68, § 1450.85.

34. If Illinois is correct, each Stroman agent would have to be licensed in each of the fifty states because it is impossible to predetermine which states will be involved in any given transaction when Stroman receives a call from a prospective buyer.

THE REGULATORY SCHEME

35. Texas, Illinois and every other state, have comprehensive real estate licensing laws. The laws of each state contain basic educational criteria and require brokers and salespersons to be scrupulously honest in their dealings with buyers and sellers.

Illinois

36. Illinois's real estate sales licensing scheme is briefly described in the following paragraphs.

37. A real estate broker in Illinois means an individual or business entity, other than a salesperson or leasing agent, who for another and for compensation actually or offers to sell, exchange, purchase, rent or lease real estate. The definition also includes anyone who negotiates or offers to negotiate such transactions and "assists or directs in procuring or referring of prospects, intended to result in the sale, exchange,

lease, or rental of real estate." 225 Ill. Comp. Stat. Ann 454/1-10. A "salesperson" is any individual, other than a real estate broker, employed by or associated with a broker as an independent contractor, who participates in activity covered by the definition of "broker". Id.

38. The term "real estate" includes timeshares, as well as other interests in real property "whether the real estate is situated in [Illinois] or elsewhere." Id.

39. Applicants for either an Illinois broker's license or a salesperson's license must pay a $125 application fee, plus an additional $45 examination fee payable to the designated testing service for the required exam. The exam is not given in Texas. The candidate for an Illinois salesperson's license must complete 45 hours of instruction in an approved Real Estate Transaction Course, including at least 15 hours in agency, disclosure and environmental issues. The candidate for an Illinois broker's license who does not already have a salesperson's license must complete 120 hours of instruction, including the hours required to obtain a salesperson's license, 45 hours that include 15 hours each in brokerage administration and contracts and conveyances, and 30 hours in other approved course work. Applicants who already have a salesperson's license must complete 75 hours of approved course work.

40. To maintain an Illinois broker's or salesperson's license, every two years the licensee must complete 12 hours of continuing education for each licensing period. The renewal fee is $150 for brokers and $100 for salespersons and is paid biannually.

41. Illinois does not have a licensing reciprocity agreement with Texas.

42. Illinois real estate licensees are subject to license revocation, suspension and fines for failing to comply with the license law and the commission of various enumerated offenses. These offenses include, but are not limited to, making false promises of a character likely to induce, paying compensation to any unlicensed person for licensed activity and failing to keep an escrow or trust account for funds deposited with the licensee. 225 Ill. Comp. Stat. Ann. 454/20-20. An unlicensed person cannot collect commissions for brokerage activities. 225 Ill. Comp. Stat. Ann. 454/10-15. Acting as a broker or salesperson while unlicensed is punishable by a $25,000 fine. 225 Ill. Comp. Stat. Ann. 454/20-10.

43. Nonresident licensees irrevocably consent to service of process through DFPR. Process served on DFPR constitutes service on the licensee as though the licensee were personally served in the State. 225 Ill. Comp. Stat. Ann. 454/5-60.

44. Employing brokers are required to have written employment agreements with every salesperson it employs or utilizes as an independent contract that addresses the terms of the relationship, including supervision, duties, compensation and termination. 225 Ill. Comp. Stat. Ann. 454/10-20.

45. Under the Timeshare Act, an agent reselling a timeshare interest is required to deposit any fees collected prior to closing into an escrow account. Any fees paid to the agent prior to closing may be disbursed

only upon receipt of a disbursement authorization signed by the owner in the following form:

> I, (name of owner), am the owner of a timeshare interest in (name of timeshare plan). I understand that for my protection I can require the entire fee to be held in escrow until the closing on the resale of my timeshare interest, but I am authorizing a release before the transfer in the following amount: (amount written in words) ($ (amount in numbers)), for the following purpose or purposes (description of purpose or purposes). I understand that the resale agent is regulated by [DFPR] under the Real Estate Timeshare Act of 1999. [DFPR] requires the resale agent to obtain this disbursement authorization with my signature before disbursement of my funds.

765 Ill. Comp. Stat. Ann. 101/5-40.

46. To obtain authority as a foreign corporation from the Illinois Secretary of State, a corporation must pay a $150 fee and file an application that includes, among other information, the aggregate number of shares it has authority to issue, itemized by class, a statement of the paid-in capital of the corporation, an estimate of the dollar value of all property to be owned by the corporation, wherever located and an estimate of the gross amount of business to be transacted during the year. 805 Ill. Comp. Stat. Ann. 5/13-15. The corporation also must file annual reports that include this information, along with a $75 fee. 805 Ill. Comp. Stat. Ann. 5/14-05. In addition, foreign corporations are

subject to license fees and franchise fees. 805 Ill. Comp. Stat. Ann. 5/15-50, 805 Ill. Comp. Stat. Ann. 5/15-65.

Texas

47. The Texas licensing requirements are more extensive than those of many other states. The real estate licensing scheme of Texas is briefly described in the following paragraphs.

43. In Texas, a real estate broker is any person who, "in exchange for a commission or other valuable consideration or with the expectation of receiving a commission or other valuable consideration . . . for another person" sells, offers to sell, negotiates the listing or sale, lists, appraises, auctions, buys or options real estate. A real estate salesperson "means a person associated with a licensed broker for the purposes of performing acts or transactions comprehended by the definition of real estate broker as defined in the Texas Real Estate License Act. Tex. Occ. Code Ann. § 1101.02.

49. Applicants for a broker's license must complete 60 semester hours (180 hours), or equivalent classroom hours of core real estate courses to be eligible for a license. Tex. Occ. Code Ann. § 1101.356. Applicants for a salesperson's license must complete 12 semester hours in core real estate courses, including 4 hours in principles of real estate and 2 hours each in the law of agency and contract law. Tex. Occ. Code Ann. § 1101.358. Core real estate courses include, but are not limited to, principles of real estate, real estate appraisal, real estate law, real estate finance, real estate marketing, real estate mathematics, real estate

brokerage, property management, real estate investments, and agency law. Tex. Occ. Code Ann. § 1101.003. Before the first, second and third annual renewal, salespersons must respectively complete 14, 16, and 18 semester hours of post-licensure education per annual renewal period. Tex. Occ. Code Ann. § 1101.454. All licensees, not subject to post-licensure educational requirements, must complete 15 classroom hours of continuing education requirements approved by the Real Estate Commission for each annual renewal. Texas Real Estate License Act § 7A. Applicants for a broker's license must pay a $300 application fee, $10 Recovery Fund Fee for each renewal and $59 for a licensing exam. Applicants for a salesperson's license must pay a $69.50 application fee, $49 for the first three annual renewals and $102 for each renewal thereafter and $59 for a licensing exam. Resident Texas brokers must maintain an office within Texas. Tex. Occ. Code Ann. § 1101.552.

50. The Texas Real Estate Commission is authorized to suspend or revoke any license or impose fines for a host of enumerated offenses. Such offenses include, but are not limited to, violation of the Real Estate License Act, making a misrepresentation or false promise, failing to properly disclose an agency, failing to account for money or commissions, misuse of funds, failing to disclose commissions, guaranteeing profit on sale of real property, accepting secret profits, offering real estate for sale without the consent of the owner, failing to deposit money into an escrow account, or failing to produce books to the Real Estate Commission for an investigation. Administrative penalties up to $1,000 may be imposed. Tex. Occ. Code Ann. §§ 1101.651, 1101.652, 1101.702.

Other States

51. If Florida, California, Arizona and Illinois can require Stroman to comply with their respective laws pertaining to real estate sales for its interstate timeshare resale activities, Stroman would likewise be subject to the laws of the other states, all of which have similar definitions of "broker," or explicitly include soliciting timeshare sales in their definitions of broker, have educational requirements that are redundant and include topics not relevant to the timeshare resale business, and repeating fees. Thus, for example, Colorado, Virginia, and Pennsylvania all similarly define broker and salesman or specifically include those involved in timeshare sales within their definition, all have their own fee structures and educational requirements, all subject licensees to fines and other penalties for violations of rules and regulations, and all prohibit fraud or misrepresentation. The laws of many of those states would require or permit Stroman to act inconsistently with the requirements of Illinois.

52. An applicant for a Colorado real estate broker's license must complete 48 hours of classroom instruction or equivalent correspondent hours in Colorado contracts and regulations and 24 hours in real estate closings regardless of any real estate licensure in any other jurisdictions. There are additional requirements of 168 hours for brokers who have not been licensed by another state. Courses include real estate law, real estate practice, trust accounts and record-keeping, real estate closing and real estate finance. Brokers licensed by another state do not have to take the additional 96 hours. Colo. Rev. Stat. § 2-61-103(4), (5). A portion of Colorado's triennial continuing education requirements

must be met by courses taken at Colorado schools. Colo. Rev. Stat. § 12-61-110.5. In Colorado, advance fees collected for advertising purposes must be maintained in a trust fund in a Colorado bank or recognized depository and may not be withdrawn until the services agreed upon have been fully performed. Rules and Regulations at the Real Estate Commission § E-2. A Colorado real estate broker is required to use a standard form approved by the Real Estate Commission for any listing contract unless the agreement was prepared by an attorney representing a party in the transaction. Rules and Regulations of the Real Estate Commission § F-1.

53. Violation of enumerated offenses by a licensee subjects the licensee to license probation, suspension, revocation or a fine not to exceed $2500. Violations include, among other things, misrepresentation, false promises, violation of the Colorado Consumer Protection Act, conflicts of interest, improper handling and accounting of funds, converting funds of others, improper record keeping, incompetence or unworthiness, secret fees or self dealing, or failing to adequately document continuing education completion. Practicing as a real estate broker or salesperson without a license is a misdemeanor punishable by a fine of not more than $500 or by imprisonment not to exceed six months, or, if a corporation, by fine not to exceed $5000. Colo. Rev. Stats. §§ 12-61-113, 12-61-119.

54. An applicant for a Virginia broker's license must take 12 semester-hours of real estate courses. Va. Code Ann. § 54.1-2105(B)(2). Applicants for a salesperson's license must complete a 45 hour course in the principles of real estate. Va. Code Ann. § 54.1-2105(B)(1); see 18

Va. Admin. Code § 135-20-360(C)(5) (requiring 60 hours of study in listed areas of study). Renewal of a Virginia real estate license requires completion of 16 hours of continuing education each licensing term of which 8 hours shall include federal fair housing laws, real estate laws and regulations, ethics and standards of conduct. Va. Code Ann. § 54.1-2105(E); 18 Va. Admin. Code § 135-20-100. Escrow accounts must be maintained in a federally insured Virginia depository. 18 Va. Admin. Code § 135-20-180(A)(1). An applicant licensed in another jurisdiction may obtain a Virginia real estate license by meeting criteria that essentially require that the applicant met requirements in the other state that were substantially similar to Virginia's education and testing requirements. 18 Va. Admin. Code § 135-20-60.

55. The Virginia Real Estate Board has the power to fine any licensee and to suspend or revoke any license or registration for violation of the real estate law including, but not limited to, failing to disclose an interest, failing to disclose an agency relationship, making misrepresentations, incompetence, conflicts of interest, improper dealings, and improper maintenance of escrow funds. 18 Va. Admin. Code §§ 135-20-155, 135-20-260.

56. In Pennsylvania, a real estate broker is any person who, for another person and a fee, assists another to acquire real estate, negotiates the listing, sale, or time share for real estate, or undertakes to promote the sale or purchase of real estate. 63 Pa. Cons. Stat. § 455.201, 49 Pa. Code, § 35.201. A salesperson is any person assisting a broker in broker activities. Id. Each must be licensed to do business in Pennsylvania. 63 Pa. Cons. Stat. § 455.301. Applicants for a broker's license must pay $40 for the licensing examination, $40 for the review of qualifications, $75 for the application and $42 to $84 (depending on biennial period) to obtain an original license. 49 Pa. Code § 35.203. Applicants for a salesman's license must pay $40 for a licensing examination, $25 application fee and $32 to $64 (depending on biennial period) license fee. Id.

57. Brokers must complete 240 hours or 16 credits of instruction, half in four of the following courses: real estate law, real estate finance, real estate investment, residential property management, nonresidential property management, real estate sales, real estate brokerage and office management, residential construction, appraisal of residential property, and appraisal of income-producing property. 63 Pa. Stat. Ann. § 455.511(3), 49 Pa. Code § 35.271. An applicant may receive two credits for each year that the applicant has been practicing in another jurisdiction with a real estate license. 49 Pa. Code § 35.271(b)(6). Real estate schools outside of Pennsylvania which have been approved "by the real estate licensing authority of the jurisdiction where the real estate education provider is located" will be accepted by the commission to fulfill the educational requirements. 49 Pa. Code § 35.271 (b)(iii). Salespersons must complete 60 hours of instruction in

basic real estate courses as a prerequisite to licensure. 63 Pa. Cons. Stat. § 455.521(2). 49 Pa. Code, § 35.272(a)(2). Brokers and salespersons must also complete a 14-hour Commission-approved continuing education program to be eligible for a biennial license renewal. 63 Pa. Stat. Ann. § 455.404a(b); 49 Pa. Code § 35.382(b).

58. Pennsylvania has a special category for timeshare salespersons who is a person who sells or offers to sell time shares in the employ of another or as an independent contractor, under the supervision of a real estate broker. 63 Pa. Cons. Stat. § 455.201. The aggregate fees for an applicant for time-share salespersons is $97 to $129 (depending on biennial period). 49 Pa. Code § 35.203. Time-share salespersons must also complete 30 hours of instruction in contract law, sales practices, procedures and ethics, and basic resort timesharing theory and then complete 30 days of on-site training at a time share facility under the supervision of a licensed broker. 63 Pa. Stat. Ann. § 455.591.

59. Listing agreements must disclose that a Real Estate Recovery Fund is available "to reimburse a person who has obtained a final civil judgment against a Commonwealth real estate licensee owing to fraud, misrepresentation or deceit in a real estate transaction ....." 49 Pa. Code, § 35.331(a)(1). In any listing agreement or contract of agency with a seller, a broker must disclose that the broker's commission and time period of the listing are negotiable, the purpose of the Pennsylvania Real Estate Recovery Fund and the commission telephone number at which the seller may obtain further information. 63 Pa. Cons. Stat. § 455.608.

Any sales agreement or contract must contain a disclosure to prospective buyers about whether the broker represents the buyer or seller, a statement regarding the Real Estate Recovery Fund, a statement regarding zoning classifications and a statement that access to public roads may require a permit. 63 Pa. Cons. Stat. § 455.608b. A purchase contract for a timeshare must contain the following:

> You, the purchaser, may cancel this purchase at any time prior to midnight of the fifth day following the date of this transaction. If you desire to cancel, you are required to notify the seller, in writing, at (address) . . . .

63 Pa. Stat. Ann. § 455.609(b).

60. All licensees are subject to disciplinary action if found guilty of any of the following acts: making a misrepresentation or false promise, failing to hold all fees until the consummation of the transaction, commingling funds, failing to deposit a principal's funds in a trust account, failing to produce trust fund rewards to the commission, failing to maintain records for three years, acting for more than one party in a transaction, failing to furnish all signatories with a copy of a contract, self dealings, obtaining secret profits, being convicted of felony, violating any Commission Rule, conducting deceptive contests, showing incompetence, unworthiness, bad faith, or dishonesty, etc. 63 Pa Stat. Ann. § 455.604(a). Practicing real estate without an active license is unlawful and punishable as a criminal summary offense by a $500 fine and/or 3 months imprisonment; subsequent offenses are considered third degree felonies punishable by a $2,000 to $5,000 fine and

between one to two years incarceration. 63 Pa. Cons. Stat. §§ 455.301, 455.303. Unlicensed practitioners of real estate may not prosecute an action for the recovery of real estate commissions or fees. 63 Pa. Cons. Stat. § 455.302. Licensed and unlicensed practitioners of real estate may also be assessed a civil penalty by the commission not to exceed $1,000 for a violation of the Pennsylvania Real Estate Licensing and Administration Act. 63 Pa. Cons. Stat. § 455.305.

61. If Stroman is subject to the licensing laws of Florida, California, Arizona and Illinois, then it is also subject to the licensing laws of the other 46 states. If so, each of its sales personnel will have to be licensed in all fifty states, because no one can anticipate what three states (location of buyer, seller and property) will be involved in any negotiation or transaction. In many cases, more than three states will be involved because Stroman's Sales Associates often talk to potential buyers in many states about a specific property before a sale is consummated. Stroman could not possibly afford the cost of the hundreds of hours lost for each agent to become licensed and remain in compliance with fifty different states as well as the hundreds of thousands of dollars this licensing would cost, not only initially but on an ongoing basis. If it were required to be licensed in California, Florida, Arizona and Illinois, Stroman would have no choice but leave the business, as would other timeshare resale brokers like Stroman. As a result, the volume of sales in interstate commerce would significantly decline, timeshare owners would be significantly deprived of access to the secondary market, and Stroman's multimillion dollar investment over the last 25 years in the business will be lost.

62. Enforcement of Illinois's real estate licensing laws and regulations against Stroman, in practical effect, discriminates against interstate commerce, unduly burdens interstate commerce, will force Stroman out of the timeshare resale business and deprive actual and potential buyers and sellers of timeshares on the secondary resale market of the ability to effectively participate therein on their own or through their selected and/or local broker.

63. Illinois's real estate licensing laws discriminate against interstate commerce, in effect, by forcing Stroman and other participants in the secondary market to undertake heavy burdens that local participants who compete with Stroman do not have to bear. For example, among other things, under Illinois law, Stroman would not only have the extra expense of having eighty or more salespersons obtain and maintain Illinois licenses, even though Stroman and its sales people already hold licenses in Texas, Stroman also will have the additional expense of creating written employment agreements for all of its agents. These expenses would force Stroman to withdraw from doing business with Illinois residents or timeshares located in Illinois. Local licensees do not have the extra cost of obtaining and maintaining licenses in more than one jurisdiction, or of maintaining multiple transaction and employment records.

64. The effect of applying Illinois's local licensing legislation to the interstate business of timeshare resales is to create such barriers to the conduct of interstate business that Stroman is deprived of access to local demand for its services in violation of the Commerce Clause. This discriminatorily favors the local

business interests of developers in Illinois who want to limit and/or suppress the national and international secondary resale market and the local brokers who generally limit their business to timeshares within their single state.

65. Since many state laws are inconsistent, subjecting Stroman's interstate business in the secondary timeshare resale market to local legislation such as that of Illinois will subject Stroman to a hodgepodge of different and/or inconsistent regulations that will make it impossible or impossibly expensive to participate in this interstate commerce, including, but not limited to, disclosure requirements, advance fee laws, right to cancel provisions, and record-keeping requirements.

66. Application of Illinois's real estate licensing law and the regulations relating thereto to Stroman's interstate business in the secondary market for timeshare resales violates Article I, Section 3, clause 8 of the Constitution of the United States because, among other reasons:

a) the application in effect discriminates against interstate commerce in favor of local business and as such is per se illegal because there are alternative ways for Illinois to accommodate any legitimate state interest it may have relating to this commerce;

b) the application creates an undue burden on interstate commerce by placing an intolerable financial burden on Stroman due to, among other things, the education requirements, reporting

requirements, requirement that it have written employment agreements with all of its salespeople, requirement that it register as a foreign corporation and escrow deposit disclosure requirement under the Timeshare Act, and by subjecting Stroman to requirements that are inconsistent with the requirements of other states which are involved in the continuous flow of the same interstate commerce;

c) the application creates an undue burden on interstate commerce by subjecting Stroman to requirements that bear little or no relationship to any legitimate regulatory interest that Illinois may have;

d) the application creates a burden on interstate commerce that is excessive in relation to any local benefit that might be obtained thereby;

e) the application projects the effect of Illinois's laws into other states by forcing Stroman to comply with Illinois' laws in timeshare resale transactions involving residents of different states;

f) the application requires Stroman to obtain a license to engage in interstate commerce;

g) this is an area of commerce that requires uniform regulation.

67. As a result of Illinois's enforcement and efforts to enforce the Real Estate License Act of 2000 and the regulations promulgated thereunder, Stroman has suffered and will continue to suffer irreparable injury in the form of lost sales and profits, increased expenses, exposure to fines, exposure of its contracts to being

declared invalid and the potential of being forced out of business. Stroman will not be able to obtain compensation for these injuries. Stroman will continue to suffer these injuries unless enforcement of the foregoing laws and related regulations is enjoined.

WHEREFORE, Stroman requests the entry of an order:

a) preliminarily and permanently enjoining Fernando E. Grillo, as Secretary of the Illinois Department of Financial and Professional Regulation of the State of Illinois from enforcing the Real Estate License Act of 2000, 225 Ill. Comp. Stat. Ann. 454 and the regulations thereunder against plaintiff in the conduct of its business in the timeshare resale market or such portions of said statutes and regulations that the Court finds should be enjoined;

b) granting attorney's fees, costs and such other and further relief as the Court deems just and proper.

Respectfully submitted,
Attorney-In-Charge

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Illinois Department of Financial and Professional Regulation

Fernando E. Grillo, Secretary
Rod R. Blagojevich, Governor

Division of Banks and Real Estate
Enforcement – Real Estate Professions

May 11, 2005

Robert L. Rice
Law Offices of Rice, Rice & Rice P.C.
675 River Rd.
Montgomery Texas, 77356

Re: Rii Stroman

Mr. Rice,

I am in receipt of your letter faxed on May 10, 2005. I welcome your involvement in this matter, and I look forward to working towards the appropriate legal resolution.

My agency received a complaint letter from an Illinois citizen who retained Rii Stroman for the purpose of reselling a timeshare interest. A review of our records shows that Rii Stroman does not hold the required licensure in Illinois to act in such a capacity. In this regard, please note the following.

The Illinois Timeshare Act defines in Sec. 1-15 a resale agent as "a person who, directly or through the person's employees or agents, sells or offers to sell a

timeshare interest previously sold to a purchaser or solicits an owner of a timeshare interest to list the owner's timeshare interest for sale." Note that the definition includes the "offering" of the resale service in Illinois, not just the actual services provided towards a transaction that closes. Also, note that the definition does not require that the timeshare interest be located in Illinois. The representation of a seller-client who resides in Illinois triggers application.

Next, the Illinois Timeshare Act provides in Sec. 5-35 that registration as a Resale Agent in the Timeshare Division does not apply to Illinois licensed real estate brokers. In turn the Illinois Timeshare Act provides in Sec. 10-20 that "any sales or resale agent shall comply with the provisions of the Real Estate License Act of 1983."

Certainly, it is clear that Rii Stroman is a real estate brokerage business. Rii Stroman's webpage expressly states that it is the "World's Largest Resale Brokerage of Timeshare Properties since 1979." And Rii Stroman's requires that "all Sales Associates are licensed Realtors."

The question is whether Rii Stroman has engaged in real estate brokerage, via its timeshare resale activities, in Illinois. In that regard, consider the following:

* Rii Stroman solicits Illinois citizens as sellers or renters.

* Rii Stroman solicits Illinois citizens as buyers or renters.

* Rii Stroman has a seller-client relationship with the Illinois citizen that filed the complaint

* Rii Stroman has client relationships with Timeshare Developers and/or their members **whose vacation properties are physically located in Illinois**. Included are Silverleaf Fox River Resort, New Horizons, and WorldMark Galena.

* Rii Stroman has client relationships with Timeshare Developers and/or their members whose business offices are located in Illinois. Included are American Resorts International Holiday Network and Shell Vacations.

* Rii Stroman's webpage expressly states that it "advertises its services everyday through local, national and international media (newspapers, magazines, trade journals, and the internet) and is the largest in-house direct mail marketing operation with over 4.5 million mail pieces annually in the resort resale industry."

* The point is that Rii Stroman has engaged in the practice of real estate brokerage in Illinois. Accordingly, Rii Stroman either needs to obtain real estate licensure in Illinois, or Rii Stroman needs to cease & desist doing business in Illinois. It may be helpful to know that, if Rii Stroman obtains the real estate licensure in Illinois, it would not be required that Rii Stroman have an office location in Illinois. Instead, Rii Stroman would simply need to comply with the conditions set forth in Sec. 5-45(d) of the Illinois Real Estate License Act.

Whether or not Rii Stroman obtains real estate licensure in Illinois, the pending case will need to be resolved. I look forward to working with you toward this end.

Division of Banks and Real Estate
By /s/
Michael J. Garvin
Attorney- Bureau of Real Estate Professions
(312) 793-1219

WAIVER OF SERVICE OF SUMMONS

TO: (Name of Plaintiff's attorney or unrepresented Plaintiff): Matt E. Rubin

(Defendant Name) I, Fernando E. Grillo, Secretary of the Illinois Department of Financial and Professional Regulation, acknowledge receipt of your request that I waive service of summons in the action of (Caption of Action) Stroman Realty, Inc. v. Fernando E. Grillo, Secretary of the Illinois Department of Financial and Professional Regulation which is case number (Docket Number) H-05-2066 in the United States District Court for the Southern District of Texas.

I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if

an answer or motion under Rule 12 is not served upon you within 60 days after (Date Request was Sent) 6/17/05 or within 90 days after that date if the request was sent outside the United States.

(Date) 7/18/05

(Signature) Mary Ann Benden for Fernando E. Grillo as (Title) Director of Enforcement of (Corporate Defendant) Real Estate Bureau of Division of Processional Real Estate IDFR.

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

No. E2005-92
STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION
DEPARTMENT OF PROFESSIONAL REGULATION
BUREAU OF REAL ESTATE PROFESSIONS

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION of the State of Illinois,

Complainant

v.

STROMAN REALTY, INC. Unlicensed,

Respondent.

NOTICE OF PRELIMINARY HEARING

TO: Stroman Realty, Inc.
14500 Hwy 105 West
Conroe, Texas 77304

PLEASE TAKE NOTICE THAT on September 6, 2005, at 9:30 a.m. you are directed to appear before the Hearing Officer for the Bureau of Real Estate Professions, located at 310 S. Michigan Ave., Suite 2130, Chicago, Illinois, at which time a hearing date will be set. You are requested to present any and all motions you may wish to have heard regarding the charges in the attached Complaint. Any and all motions presented on the above date must first be served on this agency,

ATTN: Docket Administrator, Illinois Department of Financial and Professional Regulation, Bureau of Real Estate Professions, 310 South Michigan Ave., Suite 2130, Chicago, Illinois, 60604, at least Five (5) business days in advance of the scheduled preliminary hearing.

IT IS REQUIRED THAT WITHIN TEN (10) DAYS OF THE DATE OF FILING OF THIS COMPLAINT YOU FILE AN ANSWER TO THE ATTACHED COMPLAINT. The Answer shall comply with the Rules of Practice in Administrative Hearings. It shall respond to each numbered paragraph of each Count of the Complaint by either: 1) admitting the allegation, 2) denying the allegation, or 3) under oath, stating that you have insufficient information with which to either admit or deny the allegation. Failure to file an Answer or otherwise plead, shall result in a default being taken against you. You may then be disciplined or assessed a civil penalty without an evidentiary hearing. File the Answer, signed by you, the Respondent, with the Docket Administrator at the address listed above. You may file your answer personally or by certified mail, return receipt requested. You should retain a copy of your Answer. Your attendance at the Preliminary Hearing is MANDATORY. Failure to so appear may result in the selection and/or formal evidentiary hearing dates in your absence. Your appearance my be made personally or through an Illinois licensed attorney.

RULES OF PRACTICE IN ADMINISTRATIVE HEARING 68 Ill. Admin. Code 1110, et seq.) ARE AVAILABLE UPON REQUEST.

DEPARTMENT OF PROFESSIONAL REGULATION of the State of Illinois

By
/s/ Michael J. Garvin
Attorney
IDFPR
310 S. Michigan Ave., Suite 2130
Chicago, IL 60604
312/793-1219

No. E2005-92
STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION
DEPARTMENT OF PROFESSIONAL REGULATION
BUREAU OF REAL ESTATE PROFESSIONS

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION of the State of Illinois,

Complainant,

v.

STROMAN REALTY, INC.
Unlicensed,

Respondent.

COMPLAINT

Now comes the ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, DEPARTMENT OF PROFESSIONAL REGULATION, by its Director of Enforcement of the Bureau of Real Estate Professions, Mary Anne Benden, and as its Complaint against Stroman Realty, Inc., Respondent, complains as follows:

COUNT I

1. Stroman Realty, Inc. has never been the holder of a Certificate of Registration as a real estate broker corporation in the State of Illinois.

2. Sec. 10-20 of the Illinois Timeshare Act requires that any timeshare resale agent comply with the provisions of the Illinois Real Estate License Act.

3. Between August 1, 2000, and August 1, 2005, Stroman Realty, Inc. engaged in the practice of a timeshare resales agent in Illinois. The practice included:

   (a) Stroman Realty, Inc. entered into client relationships to serve as a timeshare resale agent for owners of timeshare properties **physically located in Illinois.**

   (b) Stroman Realty, Inc. issued direct mail to Illinois citizens offering its services as a timeshare resale agent.

   (c) Stroman Realty, Inc. held itself out as a timeshare resale agent in advertising in local Illinois newspapers.

4. Stroman Realty, Inc. engaged in the practice of a timeshare resales agent in Illinois without proper licensure under the Illinois Real Estate License Act.

5. The foregoing acts and/or omissions are grounds for the assessment of a civil penalty pursuant to the Illinois Real Estate License Act, 225 ILCS Sec(s) 454/20-10(a) (2000 as amended), and the Illinois Timeshare Act, 765 ILCS 101/15-70(a) (1999 as amended).

WHEREFORE, based on the foregoing allegations, the ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, DEPARTMENT OF PROFESSIONAL REGULATION, by Mary Anne Benden, its Director of Enforcement of the Bureau of Real Estate Professions, prays that Stroman Realty, Inc. be assessed a civil penalty.

COUNT II

1. Stroman Realty, Inc. has never been the holder of a Certificate of Registration as a real estate broker corporation in the State of Illinois.

2. Sec. 10-20 of the Illinois Timeshare Act requires that any timeshare sales agent comply with the provisions of the Illinois Real Estate License Act.

3. Between August 1, 2000, and August 1, 2005, Stroman Realty, Inc. engaged in the practice of a timeshare sales agent in Illinois. The practice included:

   (a) Stroman Realty, Inc. entered into client relationships to serve as a timeshare sales agent for Timeshares Developers whose

business offices were located in Illinois, namely American Resorts International Holiday Network and Shell Vacations.

4. Stroman Realty, Inc. engaged in the practice of a timeshare sales agent in Illinois without proper licensure under the Illinois Real Estate License Act.

5. The foregoing and/or omissions are grounds for the assessment of a civil penalty pursuant to the Illinois Real Estate License Act, 225 ILCS Sec(s) 454/20-10(a) (2000 as amended), and the Illinois Timeshare Act, 765 ILCS 101/15-70(a) (1999 as amended).

WHEREFORE, based on the foregoing allegations, the ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, DEPARTMENT OF PROFESSIONAL REGULATION, by Mary Anne Benden, its Director of Enforcement of the Bureau of Real Estate Professions, prays that Stroman Realty, Inc. be assessed a civil penalty.

DEPARTMENT OF PROFESSIONAL REGULATION of the State of Illinois

BY /s/ Mary Anne Benden
Bureau of Real Estate Professions
Director of Enforcement

Michael J. Garvin
Attorney
IDFPR
310 S. Michigan Ave., Suite 2130
Chicago, IL 60604
312/793-1219

STATE OF ILLINOIS
COUNTY OF COOK

The undersigned, being duly sworn on oath, states that on 8/1/2005, I mailed with sufficient postage affixed, a copy of the foregoing Notice of Preliminary Hearing and Complaint, by certified mail, return receipt requested at 310 S. Michigan Ave., Suite 2130, Chicago, IL 60604, to all parties at the addresses listed below

/s/
Affiant

Subscribed and sworn to before me this 1 day of Aug, 2005.

/s/Debra M. Dolinksi
Notary Public

Case No.:E2005-92

Resp./Pet: Realty, Inc.

Serial No.: 7196-2958-8800-0005-0055
Stroman Realty, Inc.
14500 Hwy 105 West
Conroe, Texas 77304

Additional Addressee:
Serial No.: 7196-2958-8800-0005-0062
Williams, Birnberg & Anderson, LLP
Attn: Gerald Birnberg
2000 Bering Dr.
Suite 909
Houston, Texas 77057

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FILED
APR 2 5 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1096

In the Supreme Court of the United States

STROMAN REALTY, INC., PETITIONER,

v.

DEAN MARTINEZ, SECRETARY, ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MARY ELLEN MARGARET WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

**Counsel of Record*

Counsel for Respondent

QUESTIONS PRESENTED

Absent "exceptional circumstances," such as a "flagrantly and patently" unconstitutional state law, *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny require that federal courts abstain from interfering in an ongoing state proceeding that is judicial in nature, serves an important state interest, and provides an adequate opportunity to assert the federal claim. Under *Hicks v. Miranda*, 422 U.S. 332 (1975), a state proceeding is "ongoing" for *Younger* purposes so long as it is initiated "before any proceedings of substance on the merits have taken place in the federal court."

The questions this case presents are:

1. Whether the district court properly abstained from petitioner's Commerce Clause action to enjoin enforcement of facially-neutral state laws in a state disciplinary proceeding against petitioner.

2. Whether this Court should resolve a question not raised in the lower courts and on which petitioner alleges no split in authority: whether *Hicks* applies to the disciplinary proceeding against petitioner, who may raise its constitutional claim if it seeks judicial review of any adverse administrative decision.

3. Whether this Court should resolve two questions not raised in the lower courts, on which petitioner has alleged no split in authority, and that are not ripe: (1) whether *Younger* would require petitioner to exhaust its state law remedies by seeking judicial review if petitioner receives an adverse ruling in the pending disciplinary proceeding; and (2) whether an adverse administrative decision would have preclusive effect if petitioner did not seek judicial review.

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BRIEF IN OPPOSITION

This Court's review is not necessary either to ensure compliance with the Court's decisions or to resolve any split in authority.

It is undisputed that *Younger* and its progeny require abstention for an ongoing state administrative proceeding that is judicial in nature, serves an important state interest, and provides an opportunity to assert the federal claim. The Seventh Circuit properly applied this settled test to affirm the district court's decision to abstain here, where petitioner raised a Commerce Clause challenge to respondent's regulation of petitioner's unlicensed real estate brokerage services in Illinois, when petitioner was the subject of an ongoing Illinois disciplinary proceeding under that regulation. Petitioner asserts that the Seventh Circuit's decision conflicts with Third and Fourth Circuit cases holding that comity did not require abstention for facial Commerce Clause challenges to facially discriminatory statutes, but the lower courts here correctly distinguished such attacks from petitioner's challenge to facially neutral state laws furthering legitimate state interests. In any event, more recent Fourth Circuit case law (not cited by petitioner) makes clear that that court would reject the *per se* prohibition on abstention in Commerce Clause cases that petitioner uses as the basis for its alleged split. And there is no confusion on this issue, given that other circuit courts consistently abstain under *Younger* in Commerce Clause cases.

Petitioner also asks this Court to decide a question not raised below — whether *Hicks* applies when the

initial state proceeding is administrative — but petitioner does not allege a split in authority on this question and omits cases that have applied *Hicks* in precisely these circumstances. Petitioner's remaining two-pronged question likewise concerns issues not raised below and over which petitioner does not allege any split in authority. Moreover, these hypothetical questions — whether *Younger* requires petitioner to seek judicial review if the Department's decision is adverse and whether any such adverse administrative decision would have preclusive effect if petitioner did not — may never ripen, for petitioner may prevail in the administrative proceeding or on its pending state mandamus action. Petitioner's unripe request for advice on its future litigation strategy should be summarily rejected.

This case is a poor vehicle to answer any of the questions presented in any event. First, even an outright victory in this Court would have no effect on the lower court's decision to abstain, for even without *Younger*, abstention is appropriate here on the alternative grounds that federal courts must avoid unauthoritative guesses about Illinois law and unnecessary constitutional decisions. Abstention also may be appropriate here under general principles governing the award of equitable relief, given petitioner's available legal remedies in state court. Second, petitioner already has a federal forum for its analogous Commerce Clause claims against California and Florida regulators, whose Fifth Circuit appeal is pending.

In sum, petitioner identifies no unsettled question of federal law, or cognizable split in authority, or

conflict with this Court's precedents. Instead, it merely alleges error in the Seventh Circuit's straightforward application of *Younger*.

For all these reasons, the petition should be denied.

STATEMENT

1. As of 1997, Illinois residents owned over 51,000 timeshares throughout the United States. Pet. App. 32a. In addition, Illinois contains three timeshare resorts. Pet. App. 32a.

The Illinois Department of Financial and Professional Regulation, of which respondent is director, enforces the Illinois Real Estate Timeshare Act (765 ILCS 101/15-70(a) (2006)), which in turn incorporates the Illinois Real Estate License Act (225 ILCS 454/20-10(a) (2006)) (together, the Act). The Act is intended to evaluate the competence of those engaged in the real estate business and to regulate this business to protect the public. 225 ILCS 454/1-5 (2006). To this end, the Act generally requires Illinois licensure for those who provide brokerage services to Illinois residents or involving Illinois properties. 225 ILCS 454/1-10, 454/5-15 (2006). Brokers and salespeople must satisfy education requirements, pass an exam, and pay a bi-annual licensing fee. 225 ILCS 454/5-25, 454/5-30, 454/5-35, 454/5-65 (2006). They also must meet continuing education requirements, which may be satisfied out-of-state. 225 ILCS 454/5-70, 454/5-75 (2006). No in-state office is required if a broker maintains an active broker's license in its state of domicile and agrees to be subject to service of process for its licensed activities in Illinois. 225 ILCS 454/5-45 (2006). The Act also prohibits paying

compensation to unlicensed persons for licensed activities or filing suit for such compensation. 225 ILCS 454/10-15 (2006).

Unlicensed brokerage activity is a Class C misdemeanor and may result in a fine of up to $25,000 for each offense. 225 ILCS 454/5-15, 454/20-10, 454/20-60, 454/20-80 (2006). The Department investigates alleged unlicensed brokerage activity and conducts disciplinary proceedings, which may include a formal hearing; its final administrative decision is subject to judicial review. 225 ILCS 454/20-10, 454/20-60, 454/20-75 (2006). An action to enjoin unlicensed practice in Illinois also may be brought directly in state court, on behalf of the People of Illinois. 225 ILCS 454/20-80 (2006).

2. Petitioner engages in the interstate and international business of brokering timeshare resales and bills itself as the world's largest timeshare resale broker. Pet. App. 2a-3a, 14a, 35a. It advertises its services daily in international, national, regional, and local media, as well as on its active website, and it targets buyers and sellers with over 4.5 million pieces of direct mail annually, sent to recipients in Illinois and elsewhere. Pet. App. 15a, 37a-38a. Its business is based on a computer marketing system tailored to the timeshare resale market, with a database of over 1 million buyers, sellers, and renters. Pet. App. 36a. Petitioner provides its services via mail, telephone, and internet, and its transactions frequently involve parties or properties in two or more states. Pet. App. 14a-15a. Each seller pays an up-front fee for a three-year advertising agreement and, in the event of a sale, pays petitioner a commission. Pet. App. 14a.

3. On May 11, 2005, the Department sent petitioner a cease-and-desist letter, stating that it had received a complaint from an Illinois citizen who retained petitioner for the purpose of reselling a timeshare interest. Pet. App. 61a-64a. The letter explained that representation of an Illinois seller requires an Illinois license, which petitioner did not have. Pet. App. 61a-62a. The letter further stated that, in addition to soliciting Illinois residents as timeshare sellers, buyers, lessors, or lessees, petitioner had client relationships with (1) owners of timeshare properties located in Illinois; (2) the complainant, an Illinois resident who was a timeshare seller; and (3) timeshare developers whose business offices are located in Illinois. Pet. App. 63a. Because these activities constituted the practice of real estate brokerage in Illinois, the letter explained, petitioner had to either obtain an Illinois real estate license or cease and desist these activities. Pet. App. 63a.

On August 1, 2005, respondent issued an administrative complaint against petitioner, seeking a civil penalty. Pet. App. 71a-75a. The complaint alleged that petitioner had acted as a timeshare resale agent in Illinois between August 1, 2000 and August 2005 without a proper license by (1) entering into client relationships to serve as a timeshare resale agent for timeshare developers with offices in Illinois and with owners of timeshare properties physically located in Illinois; (2) issuing direct mail to Illinois citizens offering its services as a timeshare resale agent; and (3) holding itself out as a timeshare resale

agent in advertising in local Illinois newspapers. Pet. App. 72a-74a. The disciplinary proceeding is pending.[1]

4. Meanwhile, about a month after the Department's cease-and-desist letter and about six weeks before the Department issued its complaint, petitioner commenced this action in the Southern District of Texas, alleging that enforcement of the Act against it violated the dormant Commerce Clause. Pet. App. 3a, 28a-60a. It sought to enjoin respondent "from enforcing [the Act] and the regulations thereunder against [petitioner] in the conduct of its business in the timeshare resale market . . . ." Pet. App. 59a. The district court found that it lacked personal jurisdiction over respondent and transferred the matter to the Northern District of Illinois.[2]

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[1] Petitioner filed a state mandamus action, seeking dismissal of the administrative proceeding for lack of personal jurisdiction, but that action was dismissed for failure to exhaust administrative remedies. *Stroman Realty, Inc., v. Lyons*, No. 07 CH 09985 (Cir. Ct. Cook County). Petitioner's appeal from that dismissal is pending in the Appellate Court of Illinois, where it is fully briefed. *Stroman Realty, Inc., v. Lyons*, No. 1-07-2276. On April 14, 2008, an administrative law judge denied petitioner's motion to stay the Department proceeding pending resolution of that appeal.

[2] Petitioner filed a similar suit against respondent's Arizona counterpart, in which the Fifth Circuit recently upheld dismissal for lack of personal jurisdiction. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008). Petitioner also filed similar

Stroman Realty, Inc. v. Grillo, 2006 WL 492458 (S.D. Tex., Feb. 28, 2006).

The district court granted respondent's motion to dismiss the case on *Younger* abstention grounds. Pet. App. 12a-26a. In finding that the state proceeding served a traditional and important state interest in regulating real estate professionals, the district court distinguished the state interest at issue in *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348 (4th Cir. 2005), which the Fourth Circuit held was to limit access to the interstate market. Pet. App. 21a-22a.

5. The Seventh Circuit affirmed unanimously. Pet. App. 1a-11a.

Addressing *Younger*'s first factor and noting that petitioner agreed the Department proceeding was judicial in nature, the court rejected petitioner's argument that the proceeding was not "ongoing" for *Younger* purposes because it commenced after petitioner filed its federal complaint. Pet. App. 6a. Citing *Hicks*, the court reasoned that the Department proceeding was "ongoing" because the administrative complaint was filed even before the answer was due in the federal case, so no "proceeding of substance on the merits" had yet occurred there. Pet. App. 6a. Next,

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suits against respondent's Florida and California counterparts, whose appeal from the entry of summary judgment against them is pending. *Stroman Realty, Inc. v. Marstiller*, Nos. 05-20803, 05-20804 (5th Cir.) (oral argument heard April 30, 2007). *Younger* abstention is not among the issues raised in that appeal.

the court addressed the third *Younger* factor, finding "no reason why Stroman's dormant Commerce Clause claim could not also be adequately addressed on judicial review in the event of an adverse administrative decision," relying on its own prior decision that judicial review of the Department's decisions satisfies this element of *Younger*. Pet. App. 6a (citing *Green v. Benden*, 281 F.3d 661 (7th Cir. 2002)).

The court then turned to petitioner's argument on the second *Younger* factor: that the State's interest in regulating and disciplining real estate brokerage services provided to Illinois residents or involving Illinois properties was insufficient because petitioner's Commerce Clause claim implicated an important federal interest. Pet. App. 7a. The court observed that the same argument had been rejected in *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), which held that "'[t]he mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction.'" Pet. App. 7a (quoting *NOPSI*, 491 U.S. at 364-65, which cited *Younger*, 401 U.S. at 53). Rather than "look[ing] narrowly to [the State's] interest in the *outcome* of the particular case — which could arguably be offset by a substantial federal interest in the opposite outcome," the court emphasized, *NOPSI* instructed that *Younger* requires federal courts to "'look to the importance of the generic proceeding to the State.'" Pet. App. 7a-8a (quoting *NOPSI*, 491 U.S. at 365) (emphasis in *NOPSI*). The court also found significant that the Department regulates conduct that is not under even partial federal control. Pet. App. 9a.

Like the district court, the Seventh Circuit rejected petitioner's reliance on *Harper*, observing that the Fourth Circuit had emphasized that the state law there "did not reflect a valid interest in preventing the improper disposal of waste, but rather, '*by its very nature* serve[d] to impede interstate commerce'" by restricting interstate access to the waste removal market. Pet. App. 8a (quoting *Harper*, 396 F.3d at 354-55 (emphasis in *Harper*)). The Seventh Circuit contrasted West Virginia's facially discriminatory state interest in *Harper* with the "legitimate and substantial interest [of Illinois] in setting and enforcing the standards for those who deal with property sales involving its citizens." Pet. App. 8a-9a. Based on the complaint before it, the court concluded, "[a]t best, Stroman has argued that the statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies." Pet. App. 9a (emphasis in original).

Lastly, finding that petitioner had made no showing of "exceptional circumstances," such as that the Department proceeding "flagrantly and patently" violated an express constitutional prohibition, the court held that *Younger* abstention was proper. Pet. App. 9a-10a.

6. Petitioner's petition for panel rehearing and en banc review was denied without a single dissenting vote. Pet. App. 27a.

REASONS FOR DENYING THE PETITION

The petition raises three questions, only one of which actually challenges the Seventh Circuit's decision. The other two concern issues never argued

below, and petitioner also seeks advice on the effect of a hypothetical adverse disciplinary ruling. None of the questions requires review.

Petitioner first asserts that the Seventh Circuit's decision conflicts with the purported rule in the Fourth Circuit, which petitioner characterizes as providing that *Younger* does not apply to Commerce Clause challenges. Pet. 11-23 (citing *Harper* and *Life Partners v. Morrison*, 484 F.3d 284 (4th Cir.), *cert. denied*, 128 S. Ct. 708 (2007)). Petitioner also relies on two Third Circuit cases, but they too are inapposite and one is not even a Commerce Clause case. But *Harper* did not hold that comity never requires abstention in Commerce Clause cases, as indicated by the Fourth Circuit's own more recent case law. *Harper* merely held that abstention was inappropriate for a facial challenge to a state law that patently discriminated against interstate commerce. The lower courts here both properly distinguished *Harper* from petitioner's Commerce Clause challenge to the Act's facially neutral licensing and disciplinary regime. In short, the split that petitioner alleges is entirely illusory, and provides no ground for this Court's review. And at least four other circuits have consistently applied *Younger* abstention in Commerce Clause cases, belying petitioner's concerns about confusion on this issue.

Petitioner does not allege that its other questions implicate any split in authority. Rather, petitioner merely insists that this Court "should" decide if *Hicks* applies when the initial state proceeding is administrative. Pet. 23-28. But this Court has already decided that *Younger* applies to administrative proceedings that are judicial in nature (*Middlesex*

County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 433-34 (1982)), and there is no authority for the proposition that *Hicks* somehow would not apply in this context. On the contrary, other courts have followed *Hicks* under these circumstances.

Petitioner also invites this Court to decide a two-fold question that may never become ripe, again without alleging a circuit split: whether *Younger* will require petitioner to seek judicial review if the Department renders an adverse decision, and whether such a decision, if unreviewed, would have preclusive effect on petitioner's federal claim. These questions are not properly before the Court.

Lastly, other abstention principles would require affirmance of the dismissal here even if *Younger* would not. To address the merits of petitioner's Commerce Clause claim would require unnecessary guesses about Illinois law, which also would not be binding on Illinois tribunals. Moreover, abstention would avoid unnecessary adjudication of the constitutional question here, which may be obviated (or at least narrowed) when the Department or Illinois courts construe the Act. And general principles of equity provide yet another independent ground for affirmance, for petitioner has an adequate legal remedy in state court that precludes the award of the injunctive relief it seeks here. In any event, petitioner's Commerce Clause claim already has a federal forum in a closely analogous case: the Fifth Circuit, which is considering a judgment in petitioner's favor on an almost identical issue.

In sum, the petition fails to satisfy any of this Court's criteria for a grant of certiorari. It poses no

important question of law and the alleged circuit split is illusory. At bottom, petitioner merely contends that the Seventh Circuit misapplied settled principles governing *Younger* abstention to its Commerce Clause challenge to the pending disciplinary proceeding in this case. Certiorari should be denied.

I. There Is No Confusion, Much Less a Direct Conflict, Among the Circuits Regarding *Younger* Abstention in Commerce Clause Cases.

Petitioner alleges a split between the Seventh Circuit and the Fourth and Third Circuits and claims there is confusion after *NOPSI* over the importance of comity in *Younger* analysis for Commerce Clause claims. Pet. 11-23. Petitioner is mistaken. This Court and lower courts, including the Fourth Circuit, have held that comity requires abstention even in the context of a Commerce Clause claim. There is no confusion, let alone a direct circuit split, on this point.

A. The Court Has Consistently Approved Abstention for Commerce Clause Claims, Both Before and After *Younger*.

Long before *Younger*, the Court applied general abstention principles — avoiding unnecessary resolution of constitutional questions and "preliminary guesses" about local law — to approve abstention notwithstanding "the overriding national interests embodied in the Commerce Clause." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 103 (1944) (nonresident interstate business's challenge to state tax on "doing business" within State).

Even earlier, when approving abstention from a Commerce Clause challenge to a state criminal proceeding, the Court warned that "[a]n intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court." *Fenner v. Boykin*, 271 U.S. 240, 244 (1926). Instead, given the opportunity for review by this Court, "[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Id.* at 244.

To these general policy principles, *Younger* added two more: (1) "the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," unless that harm is "both great and immediate," and (2) comity, or "our Federalism," which requires "a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. *Younger* reiterated the general rule, "repeat[ed] time and again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions," absent "extraordinary circumstances," *e.g.*, a state law that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against

whomever an effort might be made to apply it." *Id.* at 45-53 (internal quotation marks omitted).

Although petitioner asserts that the Court has never addressed whether *Younger* abstention applies to Commerce Clause claims (Pet. 11), the Court in fact applied *Younger* in *Pennzoil*, where the plaintiff challenged enforcement of a state judgment on several grounds, including the Commerce Clause. 418 U.S. at 6 n.6. *Pennzoil*'s reasoning is instructive here: principles of comity and "proper respect for the ability of state courts to resolve federal questions" required deference to the state proceeding, in light of the State's important interest in its authority to enforce state court judgments. *Id.* at 13.

Pennzoil, *Spector Motor Serv.*, and *Fenner* thus foreclose petitioner's argument that the federal interest undergirding the dormant Commerce Clause necessarily precludes abstention.

B. Federal Courts Apply *NOPSI* Consistently When Analyzing *Younger* Abstention in Cases Involving Important Federal Interests, Including the Commerce Clause.

The Seventh Circuit's opinion is consistent with *NOPSI* and decisions by at least four other circuits applying *Younger* abstention in the face of a Commerce Clause claim. The decisions that petitioner asserts conflict with the Seventh Circuit's opinion do no such thing. Instead, they are straightforward applications of *Younger*'s criteria to the particular state statutes and interests at issue. Those decisions did not — and could not, in light of *Pennzoil* and the other cases cited above — hold that abstention is never required for a

Commerce Clause claim, as petitioner suggests. Pet. 23 (claiming that Fourth Circuit had "determine[d] that claims brought under the commerce clause are appropriately resolved in federal court"). Indeed, the Fourth Circuit itself more recently held that comity required abstention in a Commerce Clause claim. And the consistent decisions from four other circuits demonstrate no confusion on this point.

1. The Seventh Circuit's Decision Is Consistent With *NOPSI*, Which Forecloses Petitioner's *Per Se* Rule Barring Abstention in Commerce Clause Cases.

As noted above, the Seventh Circuit rejected petitioner's argument that its Commerce Clause claim precluded *Younger* abstention, relying on *NOPSI*'s rejection of the same argument, and stressed that the federal government has demonstrated no interest in regulating real estate brokerage services, a traditional state interest. Pet. App. 7a (quoting *NOPSI*, 491 U.S. at 364-65, which cited *Younger*, 401 U.S. at 53). The Seventh Circuit's reasoning is fully consistent with *NOPSI*.

NOPSI held that *Younger* abstention was inappropriate when a plaintiff challenged (on preemption grounds) a state action that was legislative rather than judicial, likening the case to "a facial challenge to an allegedly unconstitutional statute or zoning ordinance — which we would assuredly not require to be brought in state court." 491 U.S. at 372-73 (citing *Wooley v. Maynard*, 430 U.S. 705, 711 (1977)). Of importance here is that *NOPSI* also

clarified when a State's interest is sufficiently "important" to warrant *Younger* abstention.

NOPSI recognized that although "constitutional challenges to state action . . . call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action[,] . . . the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction." *Id.* at 365 (citing *Younger*, 401 U.S. at 53). In so doing, *NOPSI* echoed *Younger*'s caution that even the chilling effect of a criminal prosecution under a statute regulating speech "should not by itself justify federal intervention." 401 U.S. at 50 (distinguishing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

NOPSI also warned that *Younger* analysis does not permit even a "quick look at the merits," even when the federal claim appears to be "substantial." 491 U.S. at 372, 364-65. Moreover, *NOPSI* stressed,

> when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case — which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

Id. at 365 (emphasis in original). *NOPSI* concluded that the State's action there could "hardly be deemed 'flagrantly' unlawful for purposes of a threshold [*Younger*] abstention determination," given the need for further factual development. *Id.* at 367.

Here, the Seventh Circuit correctly followed *NOPSI*'s instructions and did not accept petitioner's mere assertion that its Commerce Clause challenge required the federal courts to exercise jurisdiction. Instead, as *NOPSI* teaches, the court took into account the importance of the State's general interest in regulating real estate professionals, and indicated that the federal interest in protecting interstate real estate brokerage is only negligible, given that the federal government does not even partially regulate it. Pet. App. 7a-9a. And as in *NOPSI*, the Act cannot be deemed flagrantly unlawful for purposes of *Younger*, given the need for factual development of petitioner's claim.

2. The Circuit Courts' Consistent Application of *Younger* to Commerce Clause Claims Exhibits No Confusion Over *NOPSI*.

Petitioner implies that only the Fourth and Seventh Circuits have addressed whether comity requires abstention in a Commerce Clause case, and asserts that courts are confused about how to apply *NOPSI*. But at least four other circuits have approved *Younger* abstention in such a case. In short, petitioner's alleged split is illusory.

Thus, the Eighth Circuit relied on *NOPSI* to squarely reject the argument that *Younger* abstention was inappropriate due to the "inherently interstate nature" of a proposed securities transaction that ten States purported to regulate. *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1140, 1142 (8th Cir. 1990); *see also Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990). The court stressed that what mattered

was not the State's interest in the particular interstate transaction at issue, but rather the State's substantial, legitimate interest in protecting its insurance policyholders. 896 F.2d at 1144-45. More recently, the same court cited *NOPSI* and rejected the argument that the State's interest in enforcing consumer protection laws was insufficient for *Younger* purposes, finding that "*Younger* clearly applies despite the nature of the [plaintiffs'] claims," which included a Commerce Clause claim. *Cedar Rapids Cellular Tel., L.P., v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002). The court observed, however, that *NOPSI* left open the possibility of an exception to *Younger* for "facially conclusive" preemption claims, such as those that are "readily apparent" or involve matters that "clearly are under exclusive federal control." *Id.* at 880 (internal quotation marks omitted).

Similarly, in *Woodfeathers, Inc. v. Washington County, Or.*, 180 F.3d 1017 (9th Cir. 1999), the Ninth Circuit reversed an injunction issued in a Commerce Clause case, citing *Younger*. After holding that enforcement of solid waste laws implicated an important state interest, the court noted that its inquiry was limited to determining if the federal interest was "readily apparent," reasoning that to decide whether to abstain based on a determination about whether the state law was preempted "would render *Younger* a nullity." *Id.* at 1021. The court defined "readily apparent" to include, for example, an issue that this Court previously decided or a state law that fell under an express preemption provision. *Id.* at 1021-22; *see also Canatella v. State of California*, 404 F.3d 1106, 1112 (9th Cir. 2005) (rejecting argument that claim of patently unconstitutional state law,

standing alone, constituted "extraordinary circumstance" for *Younger* purposes).

The Tenth Circuit is in accord, based on an unpublished decision rejecting the argument that the state agency had no valid interest in regulating the plaintiffs in light of the dormant Commerce Clause. *Trans Shuttle, Inc. v. Pub. Utils. Comm'n*, 2001 WL 1355987 (10th Cir. 2001) (unpublished). The court's reason is instructive here:

> [t]his argument does no more than restate the central controversy. It is not so much an argument against the importance of the state's interests as it is a conclusion drawn from an earlier assumption that the [plaintiffs] are exempt from state regulation, an assumption that is under attack from [the state agency] and is currently being litigated in state court.

Id. at *5.

The Sixth Circuit agrees. It affirmed *Younger* abstention, even though one of the plaintiff's claims was based on the Commerce Clause, reiterating that there is "'no reason to analyze abstention cases involving a preemption claim differently than other abstention cases,'" so long as the state court has concurrent jurisdiction to decide the question. *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 967-68 (6th Cir. 1991) (quoting *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471 (6th Cir.1989)).

Given all these cases, in which the circuits applied *NOPSI* to Commerce Clause claims in the same way the Seventh Circuit did here, there is no confusion about *NOPSI*.

3. This Case Would Come Out No Differently in the Third and Fourth Circuits.

Petitioners cite cases from the Third and Fourth Circuits, claiming a conflict with the Seventh Circuit's decision here. Pet. 11-23. But those cases held that abstention was not required due to the particular state interests and the particular Commerce Clause claims at issue in those cases: both were facial challenges to state laws whose violation of the Commerce Clause was "readily apparent" or "facially conclusive," unlike petitioner's challenge here. Thus, the purported conflict is illusory. And to the extent that petitioner reads *Harper* and *Life Partners* as holding that a Commerce Clause claim always trumps abstention, it is wrong.

In *Harper*, the Fourth Circuit determined from the face of the state law that it was motivated by an illegitimate desire to restrict foreign access to the State's solid waste removal market. 396 F.3d at 355. Not surprisingly, the court reasoned that such obvious discrimination against interstate commerce was not an "important" state interest for *Younger* purposes. *Ibid.* Thus, *Harper* itself contemplates that only where the State's manifest interest is discrimination against interstate commerce does "the commerce power itself justify a narrower view of state interests in the abstention context." *Id.* at 357. And this reasoning is consistent with *Younger*, which held that abstention is not appropriate for challenges to state laws that are "flagrantly and patently violative of express constitutional prohibitions." 401 U.S. at 53. It is also consistent with *NOPSI*'s observation that facial

attacks are not proper candidates for abstention (491 U.S. at 372-73), as well as with the reasoning in the Sixth, Eighth, Ninth, and Tenth Circuit cases described above, which all recognized that *Younger* abstention is not required for a "facially conclusive" or "readily apparent" Commerce Clause challenge.

Of significance here is that *Harper* took pains to distinguish between a state interest in neutral police power regulations and a state interest in discrimination against interstate commerce, indicating that *Younger* abstention would have been appropriate if West Virginia's interest had in fact been to prevent improper disposal of solid waste. 396 F.3d at 354-55. Indeed, the court recognized that "federal judicial interference would 'disregard the comity' that Our Federalism requires [for] interests that the Constitution and our traditions assign primarily to the States," including "property law concerns" and "certain businesses historically under state oversight." *Id.* at 352-53. Thus, to the extent that petitioner sees *Harper* as a *per se* rule that comity never requires abstention for Commerce Clause cases, even when the state interest is a traditional one and not discrimination against interstate commerce, and even when a factual record must be developed (Pet. 23), *Harper* does not support that reading. And if there were any doubt that *Harper* is not a *per se* rule, the Fourth Circuit's more recent decision that comity required abstention in a Commerce Clause case, albeit not under *Younger* (*DIRECTV, L.L.C. v. Tolson*, 513 F.3d 119, 126 (4th Cir. 2008)), eliminates that doubt.

Petitioner also relies on *Life Partners*, but that decision adds little of moment, and is not inconsistent

with the Seventh Circuit's decision in any event. That case concerned a facial Commerce Clause challenge to state laws governing viatical settlements, and the court summarily affirmed the denial of *Younger* abstention in just seven sentences that did not even mention, much less apply, *NOPSI*. 484 F.3d at 300-01. Nor did *Life Partners* read *Harper* as a *per se* rule against abstention in Commerce Clause cases. Rather, the decision suggests that the Commerce Clause challenge to the insurance regulations at issue was "facially conclusive" for *NOPSI* purposes, and would have succeeded if not for Congress's express delegation to the States of the power to regulate insurance. *See id.* at 301. This reasoning, like that of *Harper*, is consistent with *Younger* and *NOPSI* (and the other cases described above), and in no way conflicts with the Seventh Circuit's decision here.

As explained above, the Fourth Circuit would have agreed with the Seventh Circuit that comity requires abstention here. Unlike the State's discriminatory interest in limiting access to the interstate market in *Harper* (and implicitly in *Life Partners*), the State's interest here is in regulating and disciplining unlicensed brokerage services to Illinois residents and for Illinois real property, a traditional state interest. And unlike the facial challenge in *Harper*, petitioner's challenge to the Act requires development of a factual record. Under these circumstances, the lower courts properly distinguished *Harper*. There is no conflict.

Petitioner's reliance on two Third Circuit cases is similarly misplaced. In *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), which is not a Commerce Clause case, the court held that abstention

was inappropriate for a claim concerning the Surface Transportation Board's exclusive jurisdiction. *Id.* at 309-10 & n.21. In so doing, *Hi Tech* characterized as mere dicta *NOPSI*'s reliance on *Younger* for the proposition that "the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction" (*NOPSI*, 491 U.S. at 365), despite its own reliance on that very language in an earlier case. 382 F.3d at 306 (citing *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 214 (3d Cir. 1993)). Instead, the court (like petitioner) relied on one of its own pre-*NOPSI* decisions: *Ford Motor Co. v. Ins. Comm'r of the Comm. of Penn.*, 874 F.2d 926 (3d Cir. 1989), which held that *Younger* abstention was inappropriate in a Commerce Clause claim because the State's interest in prohibiting affiliation with savings and loan companies was not sufficiently important for *Younger* purposes due to pervasive federal regulation of banking, especially savings and loan bailouts. *Id.* at 934-35. As with petitioner's Fourth Circuit authorities, nothing in these two Third Circuit cases indicates that the court would have decided that *Younger* abstention from petitioner's Commerce Clause claim was inappropriate. And because *Ford Motor Co.* pre-dates *NOPSI*, it is of questionable vitality in any event. Here, of course, petitioner did not assert that a federal agency has "exclusive," or even pervasive, authority over real estate brokerage. Indeed, as the Seventh Circuit pointedly stated, there is no federal regulation whatsoever in this area. Pet. App. 9a.

In sum, petitioner's alleged circuit split is entirely manufactured, for nothing in Third or Fourth Circuit jurisprudence establishes that *Younger* abstention would be inappropriate in this case, where petitioner

challenges a facially neutral statutory regime in an area that is traditionally governed exclusively by the States. Rather, petitioner seeks a complete overhaul of *Younger* abstention, under which *Younger* becomes a nullity whenever "core national interests" are at stake. Pet. 11. *Younger* and its progeny do not permit this result, and neither the Third nor the Fourth Circuit has adopted it.

II. *Hicks* Has Been Applied to Administrative Proceedings.

As petitioner admits, *Hicks* expanded the definition of "ongoing" for *Younger* purposes to include a state proceeding that commences before a proceeding of substance on the merits has occurred in the federal action (Pet. 24 (citing 422 U.S. at 349)), and *Middlesex* held that *Younger* applies when the state proceeding is an administrative one that is judicial in nature. Nevertheless, petitioner urges the Court to use this case to carve out an exception from *Hicks* for administrative proceedings. Pet. 23-28. But petitioner forfeited this claim by not raising it below. And even now, petitioner does not allege that there is any split in authority on this issue. In any event, no exception is warranted, especially here.

Although petitioner argues that it cannot be inferred from this Court's opinions that *Younger* applies when the later-filed initial state proceeding is administrative (Pet. 24 n.13), petitioner is mistaken. In *Ohio Civil Rights Comm'n v. Dayton Christian Schs.*, 477 U.S. 619 (1986), *Younger* applied because, among other things, the administrative proceeding there "began before any substantial advancement in the federal action took place" (*id.* at 627), as in *Hicks*.

Petitioner also ignores cases from other circuits in which *Hicks* was applied when an administrative proceeding commenced after the filing of the federal complaint but before any proceeding of substance on the merits in the federal case. One such decision is among petitioner's own authorities for the first question in the petition: in *Ford Motor Co.*, the Third Circuit applied *Hicks* and held that the state administrative proceeding, which was initiated *after* the federal complaint was filed but before any proceeding of substance on the merits occurred in the federal case, was "ongoing" for *Younger* purposes. 874 F.2d at 932 n.8. The Ninth Circuit has done so too. *Communications Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1016 (9th Cir. 1999) (applying *Younger* when federal plaintiff initiated state administrative proceeding three weeks after filing federal complaint but before district court had done anything of substance on the merits).

Undaunted by the lack of any contrary authority, petitioner instead stresses *Hicks*'s "distinctive and determinative condition of plaintiff-defendant privity" (Pet. 27), but that privity exists here in any event. Petitioner also complains about "substantial distinctions" between administrative proceedings generally and the criminal proceeding in *Hicks*, citing the State's "paramount interest" in criminal proceedings and the immediate attention given to constitutional claims, and contrasting an administrative proceeding's lack of (unidentified) "procedural safeguards," restricted discovery, and the limited record for judicial review. Pet. 25-28 & n.15. Yet the Third Circuit and the Ninth Circuit applied *Hicks* to later-commenced administrative proceedings,

implicitly finding such differences immaterial. Indeed, petitioner's concerns about discovery and the like are relevant to *Younger*'s "adequacy" inquiry, not the "ongoing" inquiry, and according to petitioner, its constitutional claim will be considered *de novo* if it seeks judicial review. Pet. 26 n.15. In fact, the Seventh Circuit recently examined this same system for judicial review in another case against the Department and concluded that it satisfies *Younger*'s "adequacy" inquiry. *Green v. Benden*, 281 F.3d 661, 666-67 (7th Cir. 2002).

As for petitioner's Scylla and Charybdis argument (Pet. 26 (citing *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)), petitioner is not a "hapless plaintiff." *Steffel* permits declaratory relief when a prosecution is merely threatened, whereas petitioner seeks injunctive relief against an ongoing prosecution that petitioner itself is trying to stall, thereby delaying state court resolution of its constitutional claim. This distinction is critical. *See Doran v. Salem Inc.*, 422 U.S. 922, 928-31 (1975) (holding *Younger* inapplicable for plaintiffs who complied with state law when threatened with prosecution but applying *Younger* for claim by plaintiff for whom criminal summons was issued just days after federal suit was filed); *Wooley*, 430 U.S. at 712 (finding *Younger* inapplicable where plaintiff sought injunctive relief against future prosecutions after being prosecuted three times in five weeks, and distinguishing a first threatened prosecution).

Nor are petitioner's criticisms unique to administrative actions begun after the filing of a federal complaint: they would apply with equal force to an indisputably "ongoing" administrative action

initiated the day before the filing of a federal complaint. Thus, it appears that petitioner objects to *Younger* abstention in *all* administrative proceedings, not just when *Hicks* applies. Indeed, petitioner's reliance on the dissent in *Hicks* for its criticism that *Hicks* turns *Younger*'s "ongoing" inquiry "on its head" (Pet. 27-28) could be asserted just as well against all state proceedings, including criminal ones. And as one of petitioner's own authorities indicates, *Hicks* is not an absolute bar to a federal forum. A plaintiff can avoid its effect by quickly obtaining a preliminary injunction and thereby moving the federal case "well beyond 'the embryonic stage' . . . ." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984).

In sum, for the first time in this litigation and without identifying any split in authority, petitioner urges an exception to *Hicks* for administrative proceedings. Petitioner cannot identify a single court that has found fit to adopt such a rule, and other courts have implicitly rejected it. Moreover, petitioner's reasons for this exception to *Hicks* would apply with equal force to administrative proceedings filed *before* the federal complaint, and perhaps even to all after-filed state proceedings. This invitation to adopt petitioner's novel position should be declined.

III. Petitioner's Remaining Questions — Whether *Younger* Will Require Petitioner to Pursue Judicial Review if the Department's Decision Is Adverse, and Whether That Decision Will Have Preclusive Effect If Petitioner Does Not Seek Review — Prematurely Ask This Court's Advice on Future Litigation Strategy.

Petitioner's third ground for seeking review, which petitioner also forfeited by not raising it in the Seventh Circuit, is a two-fold request for advice on how to handle a hypothetical, future contingency. Petitioner wants to know, in the event that the Department issues a decision adverse to it in the disciplinary proceeding, whether petitioner must seek judicial review of that decision and, if petitioner does not, whether that decision would have preclusive effect. Pet. 28-35. But the proceeding may result in a decision that petitioner's conduct did not violate the Act, or that the Act does not authorize the Department to exercise personal jurisdiction over it. Until the state proceeding runs its course, the third question presented is not ripe for the Court's review, and petitioner therefore is seeking advisory opinions on questions not properly before the Court. In any event, even if the question were not forfeited, and even if it were not premature, it does not warrant this Court's review.

A. The Seventh Circuit Did Not "Expand" *Younger* by "Mandating" Exhaustion Here.

Petitioner asserts that the Seventh Circuit held that petitioner must pursue judicial review of any

adverse administrative decision and thus is precluded from ever bringing its dormant Commerce Clause claim in federal court. Pet. 28-34. Petitioner mischaracterizes the opinion. The Seventh Circuit neither "extends" *Younger* nor "mandates" that petitioner pursue judicial review of any adverse administrative decision. Rather, it merely holds that the administrative proceeding here is "adequate" for *Younger* purposes because petitioner will have the opportunity to raise its constitutional claim in the event of any adverse administrative decision. Pet. App. 6a-7a.

Exhaustion of available state court review was addressed in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975), which held that "a necessary concomitant of *Younger* is that a party must exhaust his state appellate remedies before seeking relief in" federal court. Since then, the Court has consistently held that a party cannot circumvent *Younger* by choosing not to pursue available state appellate remedies. *See, e.g., Pennzoil*, 481 U.S. at 16-17. Citing *Huffman*, *Dayton Christian Schs.* held that the normal rule against exhaustion of administrative remedies in Section 1983 cases (*Patsy v. Fl. Bd. of Regents*, 457 U.S. 496 (1982)) was inapplicable in the *Younger* context because "the administrative proceedings [in *Dayton Christian Schs.*] are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest." 477 U.S. at 627.

Thereafter, when addressing the different question of whether a state proceeding is "ongoing" throughout its appellate court stages, *NOPSI* recognized that

because a State's trial-and-appeals process is unitary, a party that loses in state court may neither pursue a state court appeal while concurrently seeking a federal remedy *nor* forgo that appeal and then seek a federal remedy. 491 U.S. at 368. *NOPSI* reasoned that "for a federal court to disrupt [that unitary state process's] integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." *Id.* at 369. *NOPSI* then assumed, without deciding, that *Huffman*'s rationale applies when an agency is the initial tribunal, and concluded that federal intervention, which is not permitted during the administrative phase, would not be permitted after it either. *Ibid.* In so doing, *NOPSI* relied on *Dayton Christian Schs.* and *Middlesex. Ibid.* n.4.

Thus, contrary to petitioner's view (Pet. 29-30), there is no inconsistency between *NOPSI* and *Dayton Christian Schs* on this point. Pet. 29-30. To find *Younger* inapplicable at this stage and allow the federal court to intervene mid-process "would demonstrate a lack of respect for the State as sovereign," as *NOPSI* warned. 491 U.S. at 369. It also threatens an advisory ruling on petitioner's Commerce Clause claim, for the administrative proceeding here could result in a decision that obviates, or at least narrows, the Commerce Clause inquiry. It would also require guessing about Illinois law, and Illinois tribunals (including the Department) would not be bound by those guesses.

Lastly, petitioner asserts that exhaustion should not be required when a plaintiff requests only prospective relief against future enforcement actions (Pet. 33), but petitioner's unsuccessful request to stay

the administrative proceeding here (Pet. App. 13a) means that it did not seek only prospective relief in federal court. Accordingly, this case does not present the issue on which petitioner seeks review. Also, petitioner's reliance on *Wooley* (Pet. 33) is misplaced. *Wooley* found *Younger* inapplicable to an action brought after, not during, a third prosecution in five weeks, all of which had resulted in adverse decisions that were not appealed, and the federal plaintiffs therefore were seeking purely prospective relief. 430 U.S. at 711 (distinguishing *Huffman*); *see also Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1227 (10th Cir. 2005) (approving plaintiff's pleading no contest in state prosecution and agreeing to pay resulting fines under protest to avoid dismissal under *Younger*).

In sum, even if petitioner's exhaustion question were properly preserved below, ripe for decision, and the subject of a split in authority (and it is none of these things), *NOPSI* and *Dayton Christian Schs.* already indicate that to permit petitioner to avoid *Younger* simply by sitting out judicial review after any adverse administrative decision would demonstrate a profound lack of respect for state sovereignty.

B. Petitioner's Request for Advice on the Preclusive Effect of an Unreviewed Administrative Decision Is Improper.

The Seventh Circuit was silent about whether any adverse administrative decision, if unreviewed, would have preclusive effect on petitioner's Commerce Clause claim. And because there is as yet no Department decision, adverse or otherwise, the preclusive effect of that decision remains unripe for resolution.

Nevertheless, petitioner criticizes the Seventh Circuit for the unremarkable observation that petitioner can raise its Commerce Clause claim on judicial review in state court, although petitioner also agrees (Pet. 26 n.15), and then seeks advice as to the res judicata effect of the Department's decision, if it is adverse and if petitioner does not seek judicial review. Pet. 30-34. Even if this question were ripe, it is not certworthy.

On section 1983 claims, this Court has held that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 799 (1986). The conflict that petitioner sees among cases from other jurisdictions, including a vacated Second Circuit decision and no *Younger* cases (Pet. 31-34), is a non-starter.

Plainly, petitioner's argument is with this Court, not the Seventh Circuit. It criticizes *Younger* as requiring federal courts to "shrug off" section 1983 claims, apparently believing that every section 1983 plaintiff has a right to be in federal court. Pet. 32-33 (citing *Mitchum v. Foster*, 407 U.S. 225 (1972), and *Felder v. Casey*, 487 U.S. 131 (1988)). Petitioner is wrong. Section 1983 merely provides a federal cause of action for the violation of a federal right established by a federal law or constitutional provision. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). It neither creates substantive rights nor mandates a federal forum. As for *Mitchum*, it held only that the Anti-Injunction Act does not bar claims brought under section 1983 (407 U.S. at 242-43), and

Felder held only that a state procedural law that conflicts with section 1983's purpose is preempted in *state* court actions (487 U.S. at 153). And in any event, petitioner already has a federal forum for its almost identical Commerce Clause challenge against Florida and California regulators, which is pending on appeal in the Fifth Circuit. *See, supra*, pp. 6-7 n.2.

IV. This Case Is an Exceptionally Poor Vehicle for Resolving the Questions the Petition Raises.

Even if petitioner had raised certworthy questions that were ripe and properly raised below, this case is not the vehicle for answering them.

The petition concentrates on comity, implying that it is the sole criterion for abstention, yet it ignores other policy considerations that provide alternative grounds for abstention here. Perhaps the most important is *Younger*'s instruction on "the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law," absent irreparable harm that is both great and immediate. *Younger*, 401 U.S. at 43-44. Here, petitioner has an adequate legal remedy in the state proceeding, so abstention would be warranted on general equitable principles.

Moreover, without abstention, or even if petitioner prevailed in its challenge to comity-based abstention, federal courts necessarily would have to guess about how to construe Illinois law, and that guess would not bind Illinois tribunals. *Spector Motor Serv.*, 323 U.S. at 103. With abstention, however, Illinois tribunals have the opportunity to construe the Act in a way that

obviates or narrows the constitutional question. *Pennzoil*, 481 U.S. at 11. Indeed, the state tribunals may resolve this case on state law grounds without reaching the dormant Commerce Clause claim, either in the administrative proceeding or on judicial review (or in petitioner's pending state mandamus case). If petitioner is allowed to pursue its constitutional claim in a federal forum, however, it will be impossible to be certain that enforcement of the Act truly requires a resolution of that constitutional claim. This is yet another basis for federal abstention in this case, quite apart from *Younger*.

Furthermore, petitioner already has a federal forum for its Commerce Clause challenge to other States' regulation of its activities, *i.e.*, the Fifth Circuit, which is reviewing the judgment on petitioner's almost identical Commerce Clause claim against California and Florida regulators. The Fifth Circuit's decision, if on the merits and adverse to petitioner, will have preclusive effect on its almost identical Commerce Clause claim against respondent. *United States v. Mendoza*, 464 U.S. 154, 158-59 & nn.3, 4 (1984). And if petitioner prevails in that case, the Fifth Circuit decision (while not preclusive against respondent) would be powerful persuasive authority on judicial review of any adverse Department decision.

In sum, petitioner identifies no true circuit split or conflict with the decisions of the Court, it did not preserve its current claims by raising them in the Seventh Circuit (with one exception), and some of its claims are not ripe. Moreover, given the several other grounds for affirmance, this case presents a poor vehicle for resolving any of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

STROMAN REALTY, INC.,
Petitioner,

v.

DEAN MARTINEZ, Secretary of the Illinois Department of Financial and Professional Regulation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The doctrine of *Younger* abstention has not been consistently applied by the circuit courts of appeals with some circuits discounting the federal interest and focusing instead upon the state interest in determining whether abstention is required. This failure to conduct a reasoned threshold analysis will result in abstention becoming the rule, rather than the exception, in cases involving administrative proceedings. Further, there is considerable disagreement among the circuits as to how to synthesize the principles of res judicata and collateral estoppel with *Younger* abstention in a case involving administrative proceedings; specifically, whether a party is obligated to pursue state court review of an administrative action to avoid res judicata or collateral estoppel on the legal issues that could have been addressed by a reviewing court but not the underlying administrative forum.

The questions presented for review are as follows:

1. Whether abstention in favor of a state administrative proceeding is required in cases involving important federal interests such as the commerce clause, where the underlying principle of comity is necessarily diminished thereby justifying "a narrower view of state interests in the abstention context". *Harper v. Pub. Serv. Comm'n of West Virginia*, 396 F.3d 348, 357 (4th Cir. 2005).

2. Whether *Younger* abstention should be expanded to require a federal court to abstain where an administrative proceeding is filed after institution of the federal case and the federal plaintiff cannot obtain review of the

constitutional issues until subsequent court review which is restricted to the limited record before the agency.

3. Whether *Younger* abstention requires a party to pursue a state court appeal of an administrative agency decision to avoid the application of res judicata on legal issues when the agency cannot consider the constitutional question presented by that party.

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STATUTES

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

There is a split among the circuits as to whether to apply *Younger* abstention in cases involving issues of national importance such as the commerce clause. The Third and Fourth Circuits hold that where the issue in the federal case is a peculiarly national interest, *Younger* abstention is improper. In contrast, the First, Sixth, Seventh and Eighth Circuits require abstention regardless of the nature of the underlying federal claim.

Petitioner's second and third questions, whether *Hicks v. Miranda,* 422 U.S. 332 (1975), applies to bar

federal litigation based on a post-filed administrative claim and whether a litigant must pursue state court review of agency proceedings prior to assertion of a claim under 42 U.S.C. § 1983, likewise merit review. Neither question has been addressed by this Court and the availability of a federal forum to address federal constitutional claims is of paramount importance.

Contrary to Respondent's claim, both questions were raised in the courts below. *Compare* Br. at 1, 9-10, 24 *with* Stroman's September 25, 2006 Seventh Circuit Appellate Br. at 37-38, 41-43. Even had they not been, review by the Court is appropriate. *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (citation omitted); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 & n.27 (2001).

I. The Conflict Among the Circuits on the Application of *Younger* Abstention to Federal Claims is Real and Should be Resolved by the Court.

There is confusion among the circuits as to whether *Younger* applies when the federal claim involves important national interests such as the commerce clause. Respondent, however, insists that the circuits are aligned, referring to conflicting decisions in other circuits and "more recent Fourth Circuit case law" which it claims demonstrate that certiorari is unwarranted. Br. 1, 15, 21. In fact, Respondent's authorities underscore, rather than eliminate, the

disparity among the circuits when important federal interests are at issue.

Thus, in contrast to the Third and Fourth Circuits, the court in *Alleghany Corp. v. McCartney*, 896 F.2d 1138 (8th Cir. 1990), and *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990), directly rejected the plaintiff's contention that *Younger* abstention is inappropriate when the "federal action involves commerce or supremacy clause challenges to a state statute". *McCartney*, 896 F.2d at 1142. Like the Seventh Circuit in this case, the Eighth found that the federal issues could be raised on judicial review and therefore *Younger* abstention applied. *McCartney*, 896 F.2d at 1142; *Pomeroy*, 898 F.2d at 1319. Neither case gave consideration to the nature of the underlying federal claims.

Respondent's claim that the Fourth Circuit is now in line with other circuits rests solely on *DirectTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008). *DirectTV*, however, did not involve *Younger* abstention and indicates no departure from *Harper v. Pub. Serv. Comm'n of West Virginia*, 396 F.3d 348 (4th Cir. 2005), and *Life Partners, Inc. v. Morrison*, 484 F.3d 284 (4th Cir. 2007). In *DirectTV*, the court refused to honor plaintiffs' request for a "federal court-ordered redistribution of intra-state taxation authority." *DirecTV, Inc.*, 513 F.3d at 127.[1] Noting that

[1] In taxing authority cases, courts look to the relief sought to determine if the state taxing authority is implicated. *Hibbs v. Winn*, 542 U.S. 88, 99 (2004); *DirectTV*, 513 F.3d at 124. Interestingly, in *Hibbs*, the Court specifically considered the fact that the relief sought was "prospective relief only" in holding that the Tax Injunction Act did not bar the federal suit. *Hibbs*, 542 U.S. at 99. The prospective nature of the relief sought is

taxes are the basis by which states carry on their governments, the court reiterated:

> the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts," requiring federal courts, *when the comity principle applies*, to deny relief in challenges to state tax laws "in every case where the asserted federal right may be preserved without it."

Id. at 123 (citation omitted) (emphasis added). All *DirectTV* stands for is that the court must analyze the underlying claim prior to abstaining.

Respondent also attempts to eliminate the split asserting that the Fourth Circuit only exerts jurisdiction where there is "a facial challenge to a state law that patently discriminate[s] against interstate commerce." Br. at 10. Whether the underlying commerce clause claim involves an attack based on facial invalidity versus a direct or indirect burden on interstate commerce is not dispositive.

Respondent's claim that *Life Partners* involved a facial challenge is simply wrong. Br. at 21-22. In *Life Partners*, the plaintiff challenged Virginia's assertion of authority over "all viatical settlements involving Virginia viators" on the grounds that it was so broad that it affected commerce occurring wholly outside Virginia. *Life Partners, Inc.*, 484 F.3d at 291. The plaintiff likewise argued that the requirement that anyone transacting with a Virginia viator be licensed by Virginia and the price controls established by Virginia also discriminated against com-

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also a factor in determining when *Younger* abstention is appropriate. *Wooley v. Maynard*, 430 U.S. 705, 711 (1977).

merce. *Id.* Similarly, in Petitioner's case, Stroman argued that Respondent's assertion of authority over non-residents and regulation of personal service contracts in Texas was "so broad that it affected commerce occurring wholly outside" Illinois, and Stroman likewise challenged Respondent's claim that Stroman requires an Illinois license. *Id.* And, as Respondent concedes, the reason the commerce clause claim failed in *Life Partners* was because of Congress' express delegation of authority to the states in matters involving insurance. *See* Br. at 22. In Stroman's case, there has been no such delegation.

Respondent's remaining cases do not diminish the conflict. In *Trans Shuttle, Inc. v. Pub. Utilities Comm'n*, 2001 WL 1355987 (10th Cir. Nov. 5, 2001), shuttle operators providing *intrastate* transportation in Colorado sought declaratory and injunctive relief challenging imposed fines based on the merits of their preemption claim while state court review of those penalties was pending. *Trans Shuttle, Inc.*, 2001 WL 1355987, at **5. The federal court did not address whether the nature of the federal claim should be viewed in conjunction with the asserted state interest, but focused on the fact that the preemption issue was being litigated in the state proceeding. The court did not mention any commerce clause claim in considering *Younger*, as Respondent suggests. *See* Br. at 19. Although Respondent highlights *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962 (6th Cir. 1991) as a case where the court deemed the federal preemption issue irrelevant to the abstention analysis (Br. at 19), the focus of that case, like *Trans Shuttle, Inc.*, was the state's interest in regulating *intrastate* trucking, a distinc-

tion observed in *Harper*, 396 F.3d at 356, and state court appellate review was already pending.[2]

As previously explained, the circuits also are divided as to the consideration that the federal courts should give to the nature of the federal claim in determining whether to exercise jurisdiction. Pet. at 22-23. Respondent belittles the Third Circuit's holding in *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), because it refers to *Ford Motor Co. v. Ins. Comm'r of Com. of Pa.*, 874 F.2d 926 (3d Cir. 1989), which was decided prior to *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350 (1989) ("*NOPSI*"). Br. at 23. Both *Hi Tech Trans* and *Ford Motor Co.* are good law.

Ford merely recognized the policy underlying *Younger*, observing that "the principles of comity and federalism upon which the *Younger* doctrine is predicated, are not undermined" by determining whether the state enforcement conflicts with enforcement of federal law. *Ford*, 874 F.2d at 935. *Ford*'s observation that "the presence of a claim of preemption will not preclude abstention in every case", *id.* at 935 n.12, is consistent with *NOPSI*'s statement that "the *mere* assertion of a substantial constitutional challenge to state action will not *alone* compel the exercise of federal jurisdiction", and would, as indicated by its citation in *Hi Tech*, be decided similarly today. *NOPSI*, 491 U.S. at 364 (emphasis added).

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[2] Likewise, in *Woodfeathers, Inc. v. Washington County, Or.*, 180 F.3d 1017 (9th Cir. 1999), (Br. at 18), the federal plaintiff had participated in a state court trial which was on appellate review and brought its federal claim while the appeal was pending. Abstaining, the court noted that the litigant could and did raise its preemption claims in both the state trial and appellate court proceedings. *Woodfeathers, Inc.*, 180 F.3d at 1021.

Despite the conflict and the important questions thus far left unanswered by this Court, Respondent urges the Court to deny certiorari, asserting that this case is an "exceptionally poor vehicle for resolving" those issues. Br. at 33. In so doing, Respondent makes various related arguments that presenting Stroman's commerce clause claims in federal court requires the federal court to interpret Illinois law. *Id.* As in *Hibbs*, however, Stroman has not "asked the District Court to interpret any state law - there is no disagreement as to the meaning of [the Illinois statutes], only about whether, as applied, the State's law violates the Federal Constitution." *Hibbs*, 542 U.S. at 106 n.8.[3] *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101 (1944) (Br. at 33) is thus of no consequence here. *See Spector*, 323 U.S. at 104 (in challenge to business tax, state court needed to resolve ambiguous questions concerning the subject matter of the tax, calculation and portion of business to which it applied before reaching constitutional questions). Here, the federal litigation does not involve interpretation of the statutory scheme, but rather Respondent's ability to enforce those laws against Petitioner in light of the commerce clause.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), support Respondent's claim that abstention is required to give Illinois tribunals an opportunity to construe the act "in a way that obviates or narrows the constitutional question." Br. at 33-34. *Pennzoil* involved a federal suit to have state bond and confession of judgment procedures declared unconstitutional,

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[3] Respondent appears to be raising a *Burford* abstention argument. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* was not, however, the basis for decision in the underlying case and is inapplicable here.

thereby undermining the state court judgment. *Pennzoil* stressed, however, that the Court "does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court". *Pennzoil* turned on "the State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory'". *Pennzoil*, 481 U.S. at 14 n.12 (citation omitted). Further, while the commerce clause may have been raised as a ground for challenging the state enforcement proceedings, it apparently was not the focus of the federal claim. *Pennzoil*, 481 U.S at 6 n.6. *Fenner v. Boykin*, 271 U.S. 240 (1926) (Br. at 13) is likewise inapposite. That case involved an attempt to enjoin *criminal* court action against persons operating within the state and conducting allegedly illegal transactions.

Nor is abstention warranted on the off chance that the state court on judicial review of the after-filed administrative action may resolve the case on state law grounds without reaching the commerce clause issue, as Respondent maintains. Br. at 34. *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 (1984); *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim.").

The presence of a theoretical state law remedy does not support abandoning otherwise proper federal jurisdiction. Indeed, in *Home Tele. & Tele. Co. v. Los Angeles*, 227 U.S. 278 (1913), this Court *rejected* the notion that the existence of state remedies barred federal jurisdiction, stating that this would "render impossible the performance of the duty with which

the Federal courts are charged under the Constitution" because "the power of the Federal court to afford protection to a claim of right under the Constitution . . . as against the action of a state or its officers, would depend on the ultimate determination of the state courts . . . ." *Home Tele. & Tele. Co.*, 227 U.S. at 284; *see also Schall v. Joyce*, 885 F.2d 101, 113 (3d Cir. 1989) (observing that "federal courts should assume jurisdiction over a case even though relegating the plaintiff to state law remedies would avoid the need to adjudicate a constitutional question.") (applying *Home Tele. & Tele. Co.*).

Respondent's claim that Petitioner's pending Fifth Circuit case could moot the issues in this case deserves no credence. Br. at 34. *Younger* abstention was not an issue in that case. Even if the court affirms the district court's commerce clause ruling in Petitioner's favor, that decision would not bind the Seventh Circuit, nor would it necessarily have "preclusive effect" on Respondent as it suggests. *Id.* In short, none of these hypothetical possibilities has any bearing on whether the Court should grant certiorari in this case.

II. This Court Should Address the Issue of Whether Administrative Actions Filed After a Federal Plaintiff has Filed Suit in Court Constitutes an "Ongoing State Judicial Proceeding" Compelling *Younger* Abstention.

While some circuits have applied *Hicks v. Miranda*, 422 U.S. 332 (1975) to administrative proceedings, others have not. Thus, in *CECOS Int'l, Inc. v. Jorling*, 895 F.2d 66 (2d Cir. 1990), the court refused to abstain pursuant to *Younger* where an administra-

tive proceeding was re-opened after a federal plaintiff had filed suit because there was no on-going proceeding pending at the time the federal claim was initiated. *CECOS*, 895 F.2d at 72. "A federal court need not stay its jurisdictional hand when there is no state action pending at the time the federal suit is filed, even if there is a substantial likelihood that a state proceeding will be instituted in the future to vindicate the state's interests." *Id.*, citing *Constantineau*, 400 U.S. at 439. The Court should decide whether *Hicks* has any application to administrative proceedings initiated after federal suit is filed.[4] *See* Pet. at 23-28.

Here, Petitioner brought suit after it received a letter demanding compliance with Illinois law and Stroman sued before any administrative proceeding was instituted. The Court should resolve the issue of whether a state agency can divest the court of jurisdiction under these circumstances or whether the rule set forth in *CECOS* controls.

III. This Court has Never Addressed Whether Plaintiffs are Required to Pursue State Court Review of Agency Decisions Either Before or to the Exclusion of a Federal Action Under 42 U.S.C. § 1983 Seeking Prospective Injunctive Relief.

Respondent argues that Stroman's third question is "hypothetical". Br. at 28. The availability of future

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[4] Respondent misapprehends Petitioner's point regarding plaintiff-defendant privity in *Hicks*. Br. at 25. In *Hicks*, the state court defendant was in privity with the federal court plaintiff and the state court defendant had been sued *prior* to the institution of the federal civil rights action. *Hicks*, 422 U.S. at 348. No such privity exists here.

judicial review, however, was the linchpin of the Seventh Circuit's decision when it refused jurisdiction. If, however, as other circuits have held, the availability of a state court appeal from an administrative action does not require *Younger* abstention, then it necessarily follows that the fact that one could raise a constitutional defense eventually on appeal should not result in abstention from the exercise of a federal court's jurisdiction.

Here, the administrative action in this case was instituted only after Stroman sued Respondent in federal court. Petitioner's case is thus unlike *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), where the administrative actions were ongoing at the time the plaintiffs filed their federal suits and those suits were brought with the intent to derail the agency actions.[5] Yet, the Seventh Circuit's ruling imposes an exhaustion requirement where none exists. Thus, the Seventh Circuit's ruling is at odds with the Fifth Circuit's in *Thomas v. Texas State Bd. of Med. Exam'rs*, 807 F.2d 453 (5th Cir. 1987). There, the court held "[t]he mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of *Huffman*." *Thomas*, 807 F.2d at 456. *See also*, *Norfolk & W. Ry. Co. v. Pub. Utilities Comm'n of Ohio*, 926 F.2d 567, 572 (6th Cir. 1991) (rejecting claim that state action was pending where federal plaintiff did not exhaust its right of appeal of administrative order and declining

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[5] Indeed, the state action in *Middlesex* permitted the state defendant to raise his constitutional claims in that action. *Middlesex*, 457 U.S. at 430-31.

to abstain); *CECOS*, *supra*. *Cf.*, *Pomeroy* and *McCartney*, *supra*. Where a litigant seeks prospective relief and the administrative action cannot provide it, abstention should not be required nor the litigant obligated to wait for the conclusion of an administrative action that cannot resolve the federal question.

CONCLUSION

This case presents the Court the opportunity to resolve the disparate treatment of *Younger* by the courts of appeals. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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